I. Introduction

A. Holding

The Supreme Court has made clear that deliberate indifference on the part of officials to a risk of serious harm to an inmate violates the Eighth Amendment.[1] In *Farmer*, the Court clarified that under the Eighth Amendment, the test for whether a government official was deliberately indifferent to a risk required a showing that an official was subjectively aware of the risk, not just that the behavior was objectively indifferent.[2] While the Eighth Amendment applies only to convicted persons, after *Farmer* lower courts held that the same standard applied to pretrial detainees under the Due Process Clause of the Fourteenth Amendment.[3]

Here, Plaintiff-Appellant sued county officials and medical staff under a theory of deliberate indifference in United States District Court, arguing that under the Supreme Court's holding in *Kingsley v. Hendrickson*,[4] the test for deliberate indifference in the Fourteenth Amendment context was changed from subjective to objective and that they should therefore prevail on their claim of deliberate indifference. The case was dismissed for failure to state a claim and appealed to the United States Tenth Circuit Court of Appeals under the same theory.[5]

The Tenth Circuit distinguished *Kingsley*, reasoning that the subjective component of a deliberate indifference claim was nonetheless required by stare decisis and textual analysis.[6] The court therefore found that the trial court properly dismissed the claims against all officials for failing to allege the subjective component of deliberate indifference.[7]

B. Background

The morning after his booking, pretrial detainee Thomas Pratt told jail officials he was experiencing alcohol withdrawal.[8] A day after that, he was placed on seizure precautions and prescribed medication to treat his symptoms.[9] However at 2:00 a.m. the following day his health was deteriorating.[10] The nurse examining Pratt did not contact a physician as directed by an assessment tool and did not take Pratt's vitals, but merely switched his medication.[11]

When Pratt was assessed by a doctor eight hours later he had a cut on his forehead and blood had pooled on the floor of his cell but the doctor did not provide care. [12] Later, a nurse noted that Pratt needed assistance with daily activities but she and others who evaluated Pratt did not escalate his level of care.[13] At 1:00 a.m. the next day, a detention officer found Pratt lying motionless in his bed.[14] Pratt had suffered a heart attack and was left permanently disabled.[15]

C. Roadmap

While the Tenth Circuit panel was correct that it was bound by its own precedent, it is not bound by Supreme Court precedent and should give serious consideration to the adoption of an objective test for deliberate indifference claims en banc. First, this Comment will argue that the Tenth Circuit was correct that *Kingsley* did not speak clearly to whether their objective test extended to other kinds of claims under the Fourteenth Amendment. Second, this Comment will argue that the Tenth Circuit misread precedents and performed poor analysis to conclude a subjective standard was required, and that *Farmer* does not control the standard for deliberate indifference under the Fourteenth Amendment. Third, this Comment will argue that an objective test has significant advantages over a subjective one and the overruling of the subjective test should be given serious consideration by the Tenth Circuit.

II. Analysis

A. The 10th circuit was correct that Kingsley did not speak clearly to the standard for deliberate indifference claims and was thus constrained by Tenth Circuit precedent.

The language of *Kingsley* does not clearly delineate the kinds of cases in which it is precedential. Consequently, circuit courts have split on whether to apply *Kingsley*'s subjective standard to deliberate indifference claims.[16] Furthermore, circuits differ in the exact kind of test they apply under either standard.[17]

Kingsley's argument from precedent allows but does not require an objective standard beyond the context of excessive force. *Kingsley* used broad language to discuss precedent, but at its heart the opinion simply noted that a prior case allowed a Fourteenth Amendment claim based on objective evidence.[18] Therefore, the Court reasoned, Fourteenth Amendment claims by pretrial detainees do not always require subjective proof of intent to punish, [19] paving the way for their objective test for excessive force claims. However, the fact that claims under the Fourteenth Amendment have been established without a subjective showing does not necessarily lead to the conclusion that such a showing is *never* required, only that it is not required in all cases. Thus, the Tenth circuit was right when it noted that the reasoning of *Kingsley* could be extended to deliberate indifference claims,[20] but such an extension of the subjective standard was not necessitated by *Kingsley*.

Other factors discussed in *Kingsley* do not speak to deliberate indifference claims either. *Kingsley* does include other factors supporting its holding, such as the workability of an objective standard and the existence of other means to protect officers acting in good faith from undue liability under an objective standard.[21] However, the Court's reasoning uses language much more specific to the excessive force context than in the section of their opinion concerning precedent.

The court speaks specifically to "split-second judgments" and "officer training,"[22] considerations that are largely inapplicable to the provision of care by jail medical staff. While a subjective standard in deliberate indifference cases might find support in these considerations generally, it would be a stretch to say that *Kingsley* spoke to the issue specifically.

Thus, though *Kingsley* spoke in broad language in discussion of precedent, it did not clearly speak to the standard for deliberate indifference. In fact, the term does not appear in the Court's opinion.[23] Furthermore, *Farmer* itself clearly distinguished excessive force from deliberate indifference claims.[24] Though other courts have seen fit to reevaluate their own holdings in light of *Kingsley*, the language of *Kingsley* was not definitive as to the test for all deliberate indifference claims. Thus, the Tenth Circuit was necessarily constrained by its own precedent into applying a subjective standard because it could not overrule itself without en banc consideration.[25]

B. *The court incorrectly reasoned that the standard for deliberate indifference should remain subjective based on factors other than stare decisis.*

The court was correct to bind itself to precedent, however the court deployed poor reasoning in its own analysis of the proper test for deliberate indifference.

Though *Farmer* is foundational in defining the test for deliberate indifference, the court should have been more skeptical of reliance on Eighth Amendment precedent. For one, the court distinguishes *Kingsley* because it did not involve medical staff but fails to note that *Farmer* similarly did not involve medical staff. [26] Consistent reasoning would require the court to provide some reason that the distinction between medical staff and detention officers should be instructive in its analysis of *Kingsley* but not *Farmer*.

Further, *Kingsley* casts doubt on the assumption that Eighth and Fourteenth Amendment rights are so closely related. *Kingsley* distinguished Eighth Amendment from Fourteenth Amendment cases because the amendments themselves differed, as did the nature of the claims.[27] *Kingsley* noted that while Eighth Amendment claims were based on what constituted cruel and unusual punishment, "pretrial detainees (unlike convicted prisoners) cannot be punished at all."[28] *Kingsley* therefore took pains to make clear that its ruling did not address the standard for an excessive force claim under the Eighth Amendment.[29] Reliance on Eighth Amendment cases in the Fourteenth Amendment context is thus seriously undercut by *Kingsley*.

The court's analysis of the term "deliberate" was condemned by *Farmer*, a case the court later relies on. The Tenth Circuit analyzed a dictionary definition of "deliberate," concluding that "a deliberate indifference claim presupposes a subjective component."[30] But *Farmer* explicitly rejected the "parsing of the term deliberate indifference" and instead reasoned that "'deliberate,' for example, arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental," though ultimately rejecting such an interpretation.[31] The Tenth Circuit's textual analysis of the term deliberate is therefore seriously undercut by *Farmer*'s characterization of the term as a "judicial gloss."[32]

The court's final line of reasoning fails to interpret precedent in context. The court argues that *Farmer* distinguished excessive force claims from deliberate indifference claims because *Farmer* did not "require that an official subjectively intended for force to be excessive."[33] Thus, the court concluded, there is an intent requirement inherent in deliberate indifference claims that is not necessary for excessive force cases like *Kingsley*.[34]

This analysis of *Farmer* gets the point backwards. *Farmer* specifically noted that the test for excessive force claims under the Eighth Amendment required a showing *above and beyond*

deliberate indifference.[35] Thus, *Farmer* positioned the standard for excessive force as stricter than that for deliberate indifference, the inverse of the position the Tenth Circuit takes. Therefore, the court's argument distinguishing the intent requirement between excessive force and deliberate indifference claims finds no support in *Farmer*.

In sum, The court's arguments concerning the relevance of *Farmer* to this question, their textual analysis, and their analysis of *Farmer*'s holding all fail to support their conclusion that the standard for a deliberate indifference claim must be subjective.

C. *In light of Kingsley, the court should take the chance to seriously reevaluate their decision to require a subjective showing in deliberate indifference claims.*

The court should have determined that *Kingsley* and its reasoning permitted an objective standard in Fourteenth Amendment cases. This was the determination made by the Ninth Circuit, who reasoned that *Kingsley*'s language distinguishing Eighth and Fourteenth Amendment claims permitted the application of different standards under each.[36] Thus, thew court could have concluded that only Tenth Circuit precedent, but not *Farmer*, controlled.

Given this, there are good reasons why the Tenth Circuit should take the chance to sit en banc and reevaluate their previous decision to apply a subjective standard. It is important to remember that deliberate indifference is a standard above negligence, providing significant protection to officials.[37] *Kingsley* speaks further about other jurisprudential considerations that protect officers acting in good faith, such as courts' "deference to policies and practices needed to maintain order," and the doctrine of qualified immunity.[38]

Deference towards officials is prevalent throughout cases involving detention. For example, in *Miranda v County of Lake* reasonable reliance on medical personnel ensured that officials were not held liable for the actions of those personnel.[39] Further, when evaluating a

hunger strike policy, the *Miranda* court took notice of the fact that the inmate went longer without food and water than anyone in the jail's history.[40]

Kingsley also notes that an objective standard is easier to administer. In *Caldwell v. Warden FCI Taladega,* the Eleventh Circuit applied a subjective standard to the deliberate indifference claim of a prisoner who, despite telling officers he feared for his life, was put back with a cellmate known to be unstable and violent, who had started a fire in the cell, and who ended up stabbing the prisoner.[41] The court, unable to simply evaluate officers' behavior based on what they had been told, devoted significant analysis to whether a jury could reasonably find that the officers had what amounted to constructive notice, ultimately reversing the lower court.[42] Not only would the case have been simpler from an objective standpoint, it would ultimately have turned on many of the same considerations. Moreover, the fact that this represents an edge case requiring elevation to and reversal by an appeals court does not reflect well on the behavior that judges have *allowed* under the subjective standard.

There are additional reasons for applying a subjective standard to Fourteenth Amendment claims, such as the lack of any state of mind requirement in the underlying right of action,[43] and the fairness of allowing pre-trial detainees to pursue claims under a less strict standard.[44]

III. Conclusion

In *Strain*, the Tenth Circuit correctly ascertained that *Kingsley* did not control the standard for a deliberate indifference claim under the Fourteenth Amendment and ruled in accordance with precedent. However, the court incorrectly determined that under *Farmer* the standard for a deliberate indifference claim should still be objective, while in fact *Farmer* should not be seen to directly control Fourteenth Amendment deliberate indifference claims. Thus, the Tenth Circuit should give serious consideration to overruling its precedent on this issue.

[1] *See* Farmer v. Brennan, 511 U.S. 825, 828 (1994).

[2] *Id.* at 847.

[3] *See e.g.,* Whiting v. Marathon Cnty. Sheriffs Dept., 382 F.3d 700, 703 (2004) ("[T]he legal standard for a § 1983 claim is the same under either the Cruel and Unusual Punishment Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment."); Castro v. Cnty. of L.A., 833 F.3d 1060, 1067 ("[T]he Court had consistently held . . . that the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner.").

[4] 576 U.S. 389 (2015).

[5] Strain v. Regalado, 977 F.3d 984, 987 (10th Cir. 2020).

[6] *See id.* at 989.

[7] *Id.*

[8] *Id.* at 987.

[9] *Id.* at 987–988.

[10] *Id.* at 988.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Compare Castro*, 833 F.3d at 1070 (applying an objective standard to failure-to-protect claims based on *Kingsley*), *and* Darnell v. Pineiro, 849 F.3d 17, 35 (2nd Cir. 2017) (concluding that after *Kingsley*, deliberate indifference claims no longer required a subjective showing), *with* Dang *ex rel.* Dang v. Sheriff, Seminole Cnty. 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (declining to apply *Kingsley* to a claim of inadequate medical treatment), *and* Whitney v. City of St. Louis 887 F.3d 857, 860 n.4 (8th Cir. 2018) (distinguishing *Kingsley* as an excessive force case). *See generally Strain*, 977 F.3d at 990 n.4.

[17] *Compare Castro*, 833 F.3d at 1071 (applying a four-element objective test for deliberate indifference), *with Darnell*, 849 F.3d at 29, 35 (applying a disjunctive 2-element test allowing objective showings of deliberate indifference). *Compare Dang*, 871 F.3d at 1280 (applying a 3 element subjective test for deliberate indifference), *with Whitney*, 887 F.3d at 860 (applying a 2element subjective test for deliberate indifference).

[18] *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015).

[19] *See id.*

[20] *See Strain,* 977 F.3d at 991 ("[T]he Court did not foreclose the possibility of extending the purely objective standard to new contexts.").

[21] *See Kingsley,* 576 U.S. at 399–400.

[22] *Id.* at 399.

[23] *See id.*

[24] *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994).

[25] *See Strain*, 977 F.3d. at 993 (citing United States v. White, 782 F.3d 1118, 1126–27 (10th Cir. 2015)).

[26] *See id.*, 977 F.3d at 992 n.5.

[27] *See Kingsley*, 576 U.S. at 400.

[28] *Id.*

[29] *Id.* at 402.

[30] *Strain*, 977 F.3d at 992.

[31] Farmer v. Brennan, 511 U.S. 825, 840 (1994).

[32] *Id.* at 840.

[33] *Strain*, 997 F.3d at 992.

[34] *See id.*

[35] *See Farmer*, 511 U.S. at 835 ("The claimant must show that officials applied force "maliciously and sadistically for the very purpose of causing harm.'" (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992))).

[36] *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1069 (2017).

[37] *See, e.g.,* Kingsley v. Hendrickson, 576 U.S. 389, 396 (2015).

[38] *Id.* at 399–400.

[39] *See* 900 F.3d 335, 343 (2018).

[40] *See id.* at 344.

[41] 748 F.3d 1090, 1093–1096, 1099 (2014).

[42] *See id.* at 1102.

[43] *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1069 (2017). (citing Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997)). *See generally* 42 U.S.C. § 1983 (Westlaw through Pub. L. No. 117-102).

[44] *See generally*, Recent Case, Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020)*, 134 HARV. L. REV. 2622 (2021).

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Date of JD/LLB	**May 11, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Howard Law Journal**
Moot Court Experience	**No**

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Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate**

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June 8, 2023

The Honorable Jamar Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at Howard University School of Law, and I am applying for a clerkship position in your chambers for the 2024 term. I am eager for the opportunity to strengthen my analytical and writing skills while gaining exposure to the wide variety of legal issues before the U.S. District Court for the Eastern District of Virginia. I have a demonstrated interest in a career as a litigator, and my experiences to date have prepared me to undertake the responsibilities of a clerkship in your chambers.

I have developed strong analytical, research, and writing skills through my academic and professional experiences. In my current 2L summer, I am working with trial and appellate partners at Paul, Weiss, Wharton, Rifkind & Garrison's Washington D.C. office, where I have been staffed on matters ranging between securities, antitrust, and immigration. I have also committed to an externship at the U.S. Department of Justice Civil Division's Appellate Staff for fall of 2023. My motivation to pursue these opportunities arose from prior legal experience that reinforced my interest in a litigation career. For instance, during my first law school summer at Selendy Gay Elsberg in New York, I received excellent feedback on appellate briefs and research assignments on trial and pre-trial issues I drafted. Additionally, as a student-attorney in Howard Law's Civil Rights Appellate Clinic, I wrote an appellate brief that I argued in moot court and co-drafted a petition for certiorari filed at the U.S. Supreme Court. All these experiences and more will have fine-tuned my research and writing skills before working in your chambers.

I believe other aspects of my background will likewise serve me well as a law clerk working on complex issues of federal and state law. Before law school, I gained significant experience working with securities, banking, and federal administrative agencies, including the U.S. Department of the Treasury, while working at Goldman Sachs, Bank of America Private Bank, and Accenture Consulting. These roles exposed me to varying application of federal law while developing my attention to detail and an ability to work in fast-paced, demanding environments. Additionally, as a teaching assistant for Legislation & Regulation, I practiced distilling complex information to assist first-year law students in learning topics in statutory interpretation and administrative law.

In sum, clerking in your chambers would be a great opportunity, and I am confident I will make valuable contributions to your work. Enclosed are my resumé, transcript, and writing sample. Letters of recommendation from Maria Ginsburg, a partner at Selendy Gay Elsberg, and Howard Law Professors Andrew Gavil and Valerie Schneider will arrive under separate cover. If you would like to speak to Kannon Shanmugam or Raymond Tolentino, they welcome your call (contact information below). Should you require additional information, please do not hesitate to let me know. Thank you for your consideration.

Warmly,

Ebe Inegbenebor
Enclosures

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EDUCATION

Howard University School of Law, Washington, D.C. Expected May 2024
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Honors: Merit Scholar
Activities: Senior Staff Editor on the *Howard Law Journal*, Civil Rights Appellate Clinic, Teaching Assistant for Legislation & Regulation, Incoming Teaching Assistant for Property Law, The Appellate Project (TAP) Mentee
Note (working product): *Power at What Cost: A Discussion of* Moore v. Harper *as an Example of the Supreme Court's Continued Trend Towards Immense Power*

University of Pennsylvania, Philadelphia, PA December 2018
B.A. in Political Economics, Minors in Development and Africana Studies

Honors: 2017–2018 Dean's List (3.7+ GPA), Onyx Senior Honor Society Founder's Award, Ron Brown CAPtain Scholar
Activities: Penn Undergraduate Urban Research Colloquium, Lauder Institute's Think Tanks and Civil Societies Program, Wharton African Business Forum, Founder of West African Vibe Dance Group

University of Pennsylvania Carey Law School's Global Institute for Human Rights May 2018
Certificate in Global Human Rights Law, Concentrations in Business & Human Rights and Gender & Human Rights

EXPERIENCE

U.S. Department of Justice, Civil Division, Appellate Section, Washington, D.C.
Incoming Fall Extern August 2023 – December 2023

Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, D.C.
Summer Litigation Associate and Pauli Murray Fellow May 2023 – July 2023

Howard University School of Law Civil Rights Appellate Clinic, Washington, D.C.
Student Attorney August 2022 – December 2022

- Co-wrote a petition for certiorari with two other student-attorneys filed at the U.S. Supreme Court for *N.S. v. Kansas City Board of Police Commissioners*, No. 22-556, challenging the qualified immunity doctrine
- Drafted mock appellate briefs and participated in a mock oral argument on a *Batson* challenge issue

Selendy Gay Elsberg, PLLC, New York, N.Y.
Summer Litigation Associate May 2022 – July 2022

- Co-drafted two amicus briefs filed at the N.Y. Court of Appeals and the U.S. Court of Appeals for the Second Circuit
- Drafted extensive legal memoranda for employment discrimination claims and a FINRA securities arbitration
- Attended federal trial court hearings and oral arguments on appeal; participated in a mock trial training

Accenture Federal Services, Washington, D.C.
Management Consulting Senior Analyst June 2020 – August 2021

- Collaborated with leadership at the U.S. Department of Treasury to develop a long-term strategy for overhauling the IRS's organizational structure and IT architecture to align with the 2019 Taxpayer First Act

Bank of America Private Bank, Washington, D.C.
Investment Management & Wealth Development Analyst (management pipeline program) February 2019 – May 2020

- Proposed strategic plans to bring in new business, track incoming revenue, and coordinate prospecting event planning
- Produced a program that analyzed market returns for a large client's portfolio, which helped raise $3.5M for the Bank

Goldman Sachs, New York, N.Y.
Summer Analyst, Regulatory Monitoring & Operations June 2017 – August 2017

- Coded semi-automatic FINRA reporting procedures that improved the organization's reporting timeliness

PUBLICATION

- James G. McGann, et al., *Fit for the Future: Enhancing the Capacity, Quality, and Sustainability of Africa's Think Tanks*, TTCSP GLOB. & REG'L THINK TANK SUMMIT REPS (2017).

INTERESTS

Civil rights, Chimamanda Adichie's novels, Afrobeat dance and music, Bikram yoga

HOWARD UNIVERSITY School of Law

GRADING POLICY/GRADE CUT-OFFS

THE CURRENT GRADING POLICY AND GRADE CUT-OFFS FOR THE CLASSES OF 2022 AND 2023 ARE AS FOLLOWS:

OUT OF A SCALE OF 100

CLASS OF 2023

Class Rank	Cum GPA
Top 10%	89.97-above
Top 15%	88.77-above
Top 25%	86.90-above
Top 33%	85.13-above

CLASS OF 2024

Class Rank	Cum GPA
Top 10%	88.7-above
Top 15%	87.6-above
Top 25%	86.17-above
Top 33%	84.67-above

FINAL GRADES SYSTEM

A	90-100
B	80-89
C	70-79
D	60-69
F	50-59

4-POINT SCALE CONVERSION

Cum GPA	Standard GPA
90-100	4.0
89-85	3.99 - 3.50
84-80	3.40 - 3.00
79-75	2.99 - 2.50
74-70	2.49 - 2.00
69-65	1.99 - 1.50
64-60	1.49 - 1.00
59-less	.99 - less

A J.D. student will be placed on academic probation if the student has a cumulative weighted grade point average between 72.00 and 74.99 after the end of the first year. A student who is on academic probation after the end of the first year must also participate in the upper-class Academic Support Program. Failure to participate in the Academic Support Program is grounds for dismissal. With the exception of the summer semester, probation shall terminate during the semester in which the student obtains a cumulative GPA of 75.

Display Transcript

@02748566 Ebehireme E. Inegbenebor
May 15, 2023 12:56 am

This is NOT an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Curriculum Information

Current Program

Juris Doctor

Program: Juris Doctor

College: School of Law

Major and Department: Law, Law

***Transcript type:WEB is NOT Official ***

INSTITUTION CREDIT -Top-

Term: Fall 2021

College: School of Law

Major: Law

Student Type: First-Time Professional

Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R	CEU Contact Hours
LAW	507	Main	LW	Leg. Reg.	97	3.000	291.00			
LAW	617	Main	LW	Torts	85	4.000	340.00			
LAW	619	Main	LW	Civil Procedure I	85	4.000	340.00			

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	11.000	971.00	88.27
Cumulative:	11.000	11.000	11.000	11.000	971.00	88.27

Unofficial Transcript

Term: Spring 2022

College: School of Law

Major: Law

Student Type: Continuing

Academic Standing: Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and	R	CEU Contact Hours

								End Dates
LAW	612	West/Law	LW	Constitutional Law I	88	3.000	264.00	
LAW	613	West/Law	LW	Legal Reasoning Research Writ	88	4.000	352.00	
LAW	614	West/Law	LW	Property	96	4.000	384.00	
LAW	615	Main	LW	Contracts	84	5.000	420.00	
LAW	616	West/Law	LW	Criminal Law	80	3.000	240.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	19.000	19.000	19.000	19.000	1660.00	87.37
Cumulative:	30.000	30.000	30.000	30.000	2631.00	87.70

Unofficial Transcript

Term: Fall 2022

College: School of Law

Major: Law

Student Type: Continuing

Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R	CEU Contact Hours
LAW	621	Main	LW	Constitutional Law II	86	3.000	258.00			
LAW	654	Main	LW	Legal Writing II	90	2.000	180.00			
LAW	680	Main	LW	Federal Courts	92	3.000	276.00			
LAW	721	Main	LW	Civil Rights Clinic I	92	6.000	552.00			

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	14.000	1266.00	90.43
Cumulative:	44.000	44.000	44.000	44.000	3897.00	88.57

Unofficial Transcript

Term: Spring 2023

College: School of Law

Major: Law

Student Type: Continuing

Academic Standing:

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R	CEU Contact Hours
LAW	414	Main	LW	Envir. & Energy Adm. & Reg Law	90	2.000	180.00			
LAW	629	West/Law	LW	Evidence	96	4.000	384.00			
LAW	698	West/Law	LW	CD: Supreme Ct Jurisprudence	94	3.000	282.00			
LAW	760	West/Law	LW	Trial Advocacy/Civil Exp	P	2.000	0.00			

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	9.000	846.00	94.00
Cumulative:	55.000	55.000	55.000	53.000	4743.00	89.49

Unofficial Transcript

TRANSCRIPT TOTALS (LAW) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	55.000	55.000	55.000	53.000	4743.00	89.49
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	55.000	55.000	55.000	53.000	4743.00	89.49

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Fall 2021

College: School of Law
Major: Law
Student Type: First-Time Professional

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAW	613	Main	LW	Legal Reasoning Research Writ	0.000	
LAW	615	Main	LW	Contracts	0.000	

Unofficial Transcript

Term: Fall 2022

College: School of Law
Major: Law
Student Type: Continuing

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAW	805	Main	LW	Law Journal-2L	1.000	

Unofficial Transcript

Term: Spring 2023

College: School of Law
Major: Law
Student Type: Continuing

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAW	687	West/Law	LW	Professional Responsibility	3.000	
LAW	805	West/Law	LW	Law Journal-2L	0.000	

Unofficial Transcript

Term: Fall 2023

College: School of Law

Major: Law

Student Type: Continuing

Subject	Course	Campus	Level	Title	Credit Hours	Start and End Dates
LAW	509	Main	LW	CD: Civil Lit. Practice	1.000	
LAW	525	Main	LW	Advanced Civil Procedure	3.000	
LAW	642	Main	LW	Criminal Procedure I	3.000	
LAW	647	Main	LW	Family Law	3.000	
LAW	769	Main	LW	CD: Business Organizations	3.000	
LAW	805	Main	LW	Law Journal-3L	1.000	

Unofficial Transcript

Overall Financial Aid Status Financial Aid Eligibility Menu View Status of Transcript Requests

HOWARD UNIVERSITY

Excellence in Truth and Service

School of Law
Clinical Law Center

May 9, 2023

To Whom It May Concern:

I write in support of Ebehireme "Ebe" Inegbenebor who has applied for a clerkship in your chambers.

Ms. Inegbenebor was an excellent student in my property class, earning one of the highest grades in the course. Her response to the complicated essay question on her final exam was concise, logical and well-written; it was the exact type of analysis a professor hopes to receive at the end of the semester. In addition to performing well under pressure in a timed exam, Ms. Inegbenebor was consistently prepared for class and her contributions were thoughtful and well-reasoned. I was not surprised that Ms. Inegbenebor earned an 'A' in my course and that she also excelled in legal writing and her clinical experience.

Because of her excellent performance in my course, Ms. Inegbenebor will serve as my teaching assistant in the spring of 2024. In this role, she will be responsible for running weekly office hours with first year law students and providing feedback on their written work. I can tell from her presentation and writing style that she is an organized thinker who will provide invaluable insight to first year law students.

While I did not have an opportunity to supervise Ms. Inegbenebor on lengthy written assignments, her performance in my property class demonstrates that she is a solid legal writer—she approaches legal issues with an effective mix of organization and creativity, and she is able to clearly articulate both solutions to legal problems and her reasoning. Just as importantly, Ms. Inegbenebor is a collegial and collaborative law student and it has been a pleasure to get to know her during her time at Howard. I recommend her without reservation.

Sincerely,

/Valerie Schneider/
Director, Clinical Law Center
Howard University School of Law
2900 Van Ness Street NW
Washington DC 20008
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Maria Ginzburg
Managing Partner
212.390.9006
mginzburg@selendygay.com

June 2, 2023

Via E-mail

To Whom This May Concern:

I am delighted to write this letter to recommend Ebe Inegbenebor for a clerkship in your chambers. I supervised Ebe on client matters during her summer as a litigation associate at Selendy Gay Elsberg and mentored her throughout that summer. Ebe's writing skills received excellent reviews, and her legal research and creative analytical abilities made her a valuable member of case teams. In addition, Ebe is a wonderful person and the personal time I spent with her makes me confident that any team she joins, including yours, will welcome her.

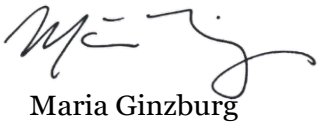
Ebe was staffed on two matters that I supervised. Senior associates who supervised these matters quickly trusted Ebe to write research emails and memoranda addressing complex issues regarding e-discovery and securities arbitration. Ebe also spent a considerable amount of time researching possible solutions to a remedies issue. Ebe's work was thorough and her discussions over the law provided clarity. She was reliable, inquisitive, and enthusiastic about her work. This made her a pleasure to work with.

Ebe also worked on two appellate matters under a former partner at our firm: one amicus brief to the U.S. Court of Appeals for the Second Circuit, and another amicus brief to the New York Court of Appeals. While I was not on that matter myself, I understand that the amicus brief to the New York Court of Appeals that our firm filed made a compelling argument that clarified opposing counsel's use of an integral case. It was Ebe who noticed the opportunity to clarify this incorrect use of the case law during her legal research and meticulous reading of the briefs.

During the summer at Selendy Gay Elsberg, the summer program leadership contracts professionals to train and develop summer associates, including a legal writing coach. After reviewing Ebe's legal memorandum about the case discussed above, the coach personally sent an email to the summer program leadership to note how impressive Ebe's writing was. She noted that it was some of the best she had ever seen from even a senior associate and was surprised to hear Ebe had only completed one year of law school.

I loved being Ebe's mentor because she is such a warm person full of integrity. She is also collaborative, enthusiastic, gentle, hard-working, and firm. We hope she returns to us and I know that she will leave a positive impact working for your chambers.

Sincerely,



Maria Ginzburg
Managing Partner

HOWARD
UNIVERSITY

SCHOOL OF LAW

June 1, 2023

Re: Letter of Recommendation for Ms. Ebehireme "Ebe" Inegbenebor

Dear Judge:

It is my great pleasure to introduce and commend to you my student, Ms. Ebehireme "Ebe" Inegbenebor, who is applying to your chambers for a clerkship. As you will quickly see from her application and hopefully a personal interview, Ms. Inegbenebor is an accomplished and mature candidate, who combines outstanding academic performance in law school with exceptional analytical and writing skills. She will also bring specific and valuable experience in brief-writing and judicial decision-making to the court, drawn from her coursework, including our Civil Rights Appellate Clinic, her summer work in the appellate practice group at Paul Weiss, and her planned externship this Fall at the Justice Department.

I am very well acquainted with Ms. Inegbenebor's academic and personal strengths, having taught her as a professor and supervised her work in my capacity as Faculty Advisor to the Howard Law Journal (HLJ), our flagship student publication. Especially relevant to her potential service as your clerk, she has outstanding analytical abilities and is an exceptional writer. She received among the highest grades awarded in both my Federal Courts course and Supreme Court Jurisprudence seminar. In the seminar, the students work collaboratively as a simulated "Supreme Court" to decide three cases pending during the current term. Each student then drafts an opinion resolving the issues in the case. Ms. Inegbenebor's three opinions were outstanding. She immersed herself in the legal issues and arguments of the parties and produced three exceptionally well-written, thoughtful, and sophisticated opinions. It is an easy prediction that she will enthusiastically and skillfully embrace the issues that confront the court.

Ms. Inegbenebor will be a committed and focused clerk, who will work well with others and continue to grow and excel as a professional. She will bring much to the court and take away much professionally if given the opportunity to serve as a clerk.

Please contact me at your convenience at either 202-806-8018 or agavil@law.howard.edu if I can be of any further assistance as you make your hiring decisions.

Sincerely,

Andrew I. Gavil
Professor of Law &
Faculty Advisor, Howard Law Journal

2900 Van Ness Street, NW
Washington, DC 20008

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WRITING SAMPLE

My writing sample is an assignment that I submitted as a student in the Supreme Court Jurisprudence seminar at Howard University School of Law. In this seminar, students were tasked with reading briefs and pertinent case law to decide three cases pending before the U.S. Supreme Court this past term chosen by our professors. While acting as "Supreme Court justices," we discussed the briefs and legal arguments before voting on the questions presented. We then individually wrote "Supreme Court opinions" based on our analysis and perspectives on the law.

This "opinion" is for *Jack Daniel's Properties, Inc. v. VIP Products LLC*, 598 U.S. ___ (2023) (No. 22–148), in which the Supreme Court will decide whether the First Amendment shields respondent VIP's humorous use of petitioner Jack Daniel's trade dress to make dog toys from trademark infringement liability under the Lanham Act.[1] The questions presented are:

1. Whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, or instead receives heightened First Amendment protection from trademark infringement claims; and
2. Whether humorous use of another's mark as one's own on a commercial product is "noncommercial" under 15 U.S.C. § 1125(c)(3)(C), thus barring as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act.

On the first question, my opinion argues that VIP's humorous use of Jack Daniel's trade dress may fall outside the scope of First Amendment protection, and thus become subject to the Lanham Act, because VIP's use of the trademark could be considered deceptive or tarnishing to Jack Daniel's brand. On the second question, my opinion argues that because VIP sold the dog toys in commerce and the use of Jack Daniel's mark was VIP's selling point for the dog toys, this constituted commercial use. My opinion vacates the judgment below and remands the case to the district court for further inquiry into whether VIP's use of Jack Daniel's mark was deceptive or tarnishing.

Per the assignment's requirements, the background section is shorter than it would be in an actual Supreme Court opinion. Aside from my final grade on the assignment, this opinion is entirely my own work. I have not received any feedback, nor has it been edited by others.

[1] As of the date that this clerkship application is submitted, the Supreme Court has not yet decided the case.

SUPREME COURT OF THE UNITED STATES

No. 22–148

JACK DANIELS PROPERTIES, INC., PETITIONER
v.
VIP PRODUCTS LLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 21, 2023]

JUSTICE INEGBENEBOR delivered the opinion of the Court.

The provisions of the Lanham Act allow a plaintiff to bring a cause of action for trademark dilution or infringement. 15 U.S.C. §§ 1114–18, 1125, 1127. The Trademark Dilution Revision Act of 2006, *id.* at § 1125(c)(3)(C), states that "any noncommercial use of a mark * * * shall not be actionable as * * * dilution by tarnishment * * * ."

The questions presented here are coupled. *First*, we discuss whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, or instead receives heightened First Amendment protection from trademark infringement liability. *Second*, we discuss whether humorous use of another's mark as one's own on a commercial product is "noncommercial" under 15 U.S.C. § 1125(c)(3)(C), thus barring as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act. We hold that humorous use of another's mark falls

outside the scope of First Amendment protection, and thus becomes subject to the Lanham Act, when the use of the mark becomes deceptive or tarnishing to a brand. Accordingly, humorous use of another's mark to place a product in the stream of commerce is commercial by definition.

I

Jack Daniel's Properties, Inc. ("JDP") is a 148-year-old U.S.-based company known for its manufacturing and distillation of liquors, primarily whiskey products. Valued at $6.5 million, its large brand is well-known for its trade dress: a distinctive square prismatic bottle shape with "Jack Daniel's Tennessee WHISKEY, old No. 7" as an arched logo written in white Jasper font and twirling white lines against a black label. The brand has become an "icon" of sorts.[1] It has remained consistent for much of the company's existence and has a significant effect on JDP's profits.

VIP Products LLC ("VIP") is the United States' second largest manufacturer of dog toys and sells its products both domestically and internationally at pet suppliers and common retailers, such as Amazon, Inc. and Walmart, Inc. Its brand is rooted in parody—the company is known to create humorous near-replicas of iconic brands in the form of dog toys to sell to consumers without first obtaining licenses. One such product is its "Bad Spaniels" toy. Similar to the traditional Jack Daniel's trade dress, the Bad Spaniels toy mimics the square prismatic bottle shape of the Tennessee Whiskey bottle with writing in a similar font against the same black label and "Bad Spaniels" appearing in arched

[1] Br. for Resp't at 3.

form. The principal difference is that the writing's substance references canine feces and features an image of a Spaniel breed dog. The back of the product's hang tag states in small-scale script, "This product is not affiliated with Jack Daniel Distillery."[2]

JDP sought to enjoin VIP's sale of Bad Spaniels under the Lanham Act, claiming that the toy likely confused consumers and thus infringed on Jack Daniel's marks and trade dress, 15 U.S.C. §§ 1114(1), 1125(a), and diluted Jack Daniel's famous marks by tarnishment by associating them with canine feces and with products that appeal to children, *id.* at § 1125(c)(1). The District Court agreed. *VIP Prod., LLC v. Jack Daniel's Properties, Inc.*, No. CV–14–2057–PHX–SMM, 2016 WL 5408313 (D. Ariz. Sept. 27, 2016), *rev'd*, 953 F.3d 1170 (9th Cir. 2020).

The Court of Appeals reversed. *Id.* Despite agreeing that VIP's product was likely to confuse consumers, the Ninth Circuit relied on *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), to hold that VIP's "humorous" dog toy was an "expressive work" warranting heightened First Amendment protection from infringement liability.[3] The court further held that VIP's use of Jack Daniel's marks to sell its dog toy was "noncommercial" and thus immune from dilution liability because the toy was "humorous."

We granted JDP's petition for certiorari. JDP argues that the Court of Appeals' ruling erroneously abrogates trademark protections afforded by the Lanham Act by imposing heightened requirements on trademark owners to prove infringement in cases involving humor. JDP also argues that the meaning of "noncommercial use" as it is used in the Trademark Dilution

[2] Pet. App. 6a.
[3] Pet. App. 31a.

Revision Act should not include the use of a mark to sell a product. We agree with JDP in certain respects.

II

We disagree with the standard that the Court of Appeals applied in determining that VIP's product was not subject to Lanham Act infringement liability. Although parody warrants some First Amendment protection, this protection is limited when use of a mark becomes deceptive or tarnishing to a brand.

The Lanham Act prohibits the use of words or symbols likely to mislead consumers about a product's source. 15 U.S.C. §§ 1114(1)(a), 1125(a). The statute requires that the defendant's use be "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(a); *see also id.* at § 1125(a) ("likely to cause confusion, or to cause mistake, or to deceive * * * as to the origin, sponsorship, or approval"). This "likely to cause confusion * * * " element should not be restricted to a consumer's potential confusion between products on a store's shelf; consumers make mental associations with brands, and another product that is too similar to a trademark can alter those mental associations.

In 2006, Congress passed the Trademark Dilution Revision Act ("TDRA"), 15 U.S.C. § 1125(c), which amended the preceding Federal Trademark Dilution Act of 1995 ("FTDA") in several ways to agree with our decision in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

The two statutes in tandem provide trademark owners with a cause of action for dilution. The TDRA made various revisions to the FTDA, four of which are relevant here. First, the TDRA extended the FTDA to trademark uses that are even "*likely* to

cause dilution." 15 U.S.C. § 1125(c)(1) (emphasis added). Second, the TDRA clarified that dilution encompasses both dilution by "blurring" and dilution by "tarnishment." *Id.* Dilution by blurring is any association that "impairs the distinctiveness of the famous mark," while dilution by tarnishment is any association "that harms the reputation of the famous mark." *Id.* at § 1125(c)(2)(B), (C); *see also Moseley*, 537 U.S. at 430, 432.

Third, Congress expanded the fair-use exclusion to cover other uses, like parody, as long as the defendant does not use the famous mark to designate the source of its own product. *Id.* at § 1125(c)(3)(A)(ii) (Fair use exclusion includes "use in connection with * * * identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner."). Fourth, Congress defined a "famous" mark as one "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner," and instructed courts to consider "all relevant factors" in making that determination. *Id.* at § 1125(c)(2)(A).

This Court has not addressed issues like those presented in this case, so the Ninth Circuit relied on *Rogers v. Grimaldi*, a decision out of the Second Circuit, to hold that VIP's "humorous" dog toy was an "expressive work" warranting heightened First Amendment protection from infringement liability. 875 F.2d 994 (2d Cir. 1989).

In *Rogers*, musical star Ginger Rogers sued a movie producer over a film called "Ginger and Fred," claiming that the title misled consumers into thinking she endorsed the film. The Second Circuit rightly expressed concern that "overextension of Lanham Act restrictions in the area of titles might intrude on First

Amendment values." *Id.* at 998. Based on this concern, it held that the Lanham Act "should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression." *Id.* at 999. In the context of "allegedly misleading titles," the court held that the Act would not apply unless the title "ha[d] no artistic relevance to the underlying work whatsoever," or "explicitly misle[d] as to the source or the content of the work." *Id.*

The test arising from *Rogers* can be summarized as such: a challenged expression is protected from the Lanham Act under the First Amendment when a) the challenged expression has some artistic relevance to the underlying trademarked product and b) the challenged expression is not explicitly misleading as to the source of the content of the expression. The test attempts to strike a balance between protections we have constitutionalized under the First Amendment and the rights of business owners to own their product in a fair market. In practice, however, *Rogers* has overburdened the rights of business owners and overprotected the use of marks that constitute some sort of speech. The fact that nearly all uses of another's trademark is speech *per se* significantly skews the balance in favor of defendants in trademark infringement and dilution claims.

We have repeatedly said that "not all speech is of equal First Amendment importance." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)). The First Amendment protects speech that promotes our philosophical justifications for the dissemination of ideas, and speech that does not accomplish this goal requires further analysis to determine its First Amendment value. It is true that parody is generally protected

because of its contribution to the marketplace of ideas and its promotion of self-governance and self-fulfillment. *See Hustlers*, 485 U.S. at 57. However, intentionally misleading speech has never been protected. *Id.* at 53 ("It is the intent to cause injury that is the gravamen of the tort * * * "); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."). Because of this consideration, the Second Circuit has even retreated from its original Rogers analysis. *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993). In the context of commercial marketplaces, speech that crosses the line to become misleading to consumers is subject to narrowly tailored government restriction in order to promote fair market practices and encourage more knowledgeable consumers. The essence of a dilution claim is to preserve the value or "selling power" of famous marks, and this selling power also warrants protection. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 541 (1987) ("The mere fact that [a defendant] claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to appropriate to itself the harvest of those who have sown.").

Bearing this in mind, we are of the opinion that the test requires a larger burden shift to the defendant in a trademark dilution or infringement claim than already exists. As the Lanham Act currently requires, the party alleging dilution or infringement must prove actual dilution. Our precedent affirms this burden to establish a *prima facie* cause of action, and we maintain this precedent today. *Moseley*, 537 U.S. at 432–34.

However, a challenged expression that has some artistic relevance to an underlying trademarked product need only have a *sufficiently compelling* likelihood of confusion with the trademarked product to fall within the scope of the Lanham Act. We believe that this modified standard will rightly place more requirements on the defendant to disprove likelihood of confusion beyond a label on the back of a product with miniscule text or a hidden disclaimer in the credits of a film production. At the same time, the artistic, expressive, or humorous nature of a defendant's use of a trademark is relevant in an analysis. We believe the standard will also continue to protect a right to use *some* elements of a trademark for humorous purposes.

In the facts presented here, we do not believe VIP has met the burden of disproving a sufficiently compelling likelihood of confusion. VIP contends a difference between using parody to advertise a product and using parody to make a product. For the purposes of the arguments asserted, the Court sees no substantive difference between the two. Whether parody is used to advertise or create a product has no bearing on whether the parody takes from the intellectual property of another.

VIP also argues that because it has not used a trademark symbol, such as ® or ™, they have made no claim of a protectable trademark. This argument is essentially like that where a defendant attempts to disprove likelihood of confusion by a disclaimer, and we reject it. Affirming VIP's argument would make it far too easy to mimic a mark and plaster a disclaimer on the product to skirt around a possible trademark violation.

Finally, VIP argues that because JDP sells liquor and VIP sells pet products, the likelihood of confusion is too low to establish brand dilution. We disagree. JDP has a well-known

trademark, and VIP's Bad Spaniels toy shares such a strong similarity to JDP's trade dress—these elements should weigh heavily in a factor test. As mentioned above, much of a brand's strength is generated in the mental associations conducted by consumers. The products sold here have a significant tendency to create negative associations with JDP's brand, especially considering the fact that JDP manufactures and sells branded merchandise like apparel that increases the brand's visibility. At any point, JDP could rightly decide to make branded dog toys for the same brand visibility purpose, which would only strengthen the negative associations that VIP's product creates with their Bad Spaniels product.

Consequently, we disagree with the Court of Appeals' reasoning that VIP's product was insulated from infringement liability because of First Amendment protections, and we reverse the judgment of the Court of Appeals on this issue.

III

We also address whether use of another's mark as one's own on a commercial product is "noncommercial" under 15 U.S.C. § 1125(c)(3)(C). We hold that such use is not noncommercial.

The Trademark Dilution Revision Act ("TDRA"), 15 U.S.C. § 1125(c)(3), provides fair-use exceptions to a dilution cause of action challenging a defendant's use of another's mark. Under the statute, a party may bring a cause of action for dilution by blurring or dilution by tarnishment, except when there is, *inter alia*, "[a]ny noncommercial use of a mark." *Id.*

At dispute is whether VIP's use of JDP's mark is "noncommercial" in the context of the TDRA, § 1125(c)(3)(C). The

TDRA does not explicitly define "noncommercial use." However, a textual and contextual analysis of the statute would lead one to conclude that "noncommercial" as purported in the TDRA means any good or service sold in commerce. "Noncommercial" can be translated to "not commercial." *Webster's Third New International Dictionary of the English Language* 1536 (2002). Dictionaries define "commercial" as "concerned with or engaged in" "the activity of buying and selling," often in the context of "making or intending to make a profit," *The New Oxford American Dictionary* 341 (2d ed. 2005).

The TDRA defines "use in commerce" as use of a mark "in the ordinary course of trade," including when a mark is placed on goods "sold" or merely "transported in commerce." § 1127. Congress invoked its commerce clause authority when enacting the statute, so it is reasonable to conclude that it intended to exclude only use of a mark that is unrelated to the sale of goods or services because such regulation might expose the statute to constitutional challenges. And precedent affirms this interpretation of the meaning of "commercial." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (holding that use of parody when selling songs is commercial "since these activities are generally conducted for profit"). Thus, "noncommercial use" can be taken to mean any use of a mark that is not in the ordinary course of trade, i.e., when selling or transporting a good or service in commerce, regardless of whether the good or service is sold for a profit.

However, the Court of Appeals interpreted "noncommercial use" differently here. The court held that the noncommercial-use exception in the TDRA is any use of a mark involving humor or expression, which would include VIP's use of JDP's marks and

trade dress to sell the Bad Spaniels toy. Because this interpretation disagrees with judicial canons of interpretation, it was improper. As discussed above, the plain and statutory meanings of the term "commercial" are very clear and consistent. And *expressio unius est exclusio alterius* suggests that when a statute includes a list of specific items, that list is presumed to be exclusive; the statute applies only to the listed items and not to others, unless otherwise stated. The TDRA lists two other exclusions without any suggestion that the list is non-exhaustive. As a matter of constitutional avoidance, we presume that Congress considered speech protections when drafting the TDRA, and § 1125(c)(3) is evidence of this. Thus, any imposition of another exclusion by the Court of Appeals was improper.

Applying our rules, VIP's Bad Spaniels toy falls within the purview of the Lanham Act and is subject to infringement and dilution liability.

* * *

Because the facts here are subject to the Lanham Act and VIP has failed to proffer sufficient facts to counter a substantially compelling likelihood of confusion between its toy product and JDP's trade dress, the judgment of the Court of Appeals was improper. We reverse that judgment and remand the case to the District Court for further proceedings in accordance with this opinion.

It is so ordered.

Applicant Details

First Name	**Timothy**
Last Name	**Intelisano**
Citizenship Status	**U. S. Citizen**
Email Address	**tdintelisano@wm.edu**
Address	**Address** Street **40 Cornell Ave** City **Cherry Hill** State/Territory **New Jersey** Zip **08002** Country **United States**
Contact Phone Number	**8569869029**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**December 2019**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 20, 2023**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**William & Mary Journal of Race, Gender, and Social Justice**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Douglas, Davison M.
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Devins, Neal E.
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

40 Cornell Avenue
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tdintelisano@wm.edu
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March 23, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a 3L at William & Mary Law School, where I am ranked in the top 6% of my class and a published member of the *William & Mary Journal of Race, Gender, and Social Justice*. I am writing to apply for a 2024-2025 term clerkship in your chambers. In the intervening year, I will be serving as a Law Clerk to the Honorable Yvette Kane in the U.S. District Court for the Middle District of Pennsylvania. I also have a standing offer to return to the Appellate and Higher Education Litigation Groups at Saul Ewing LLP in the firm's Washington D.C. office.

Attached are my resume, writing sample, and unofficial law school transcript. William and Mary will submit my recommendation letters from former Dean Davison M. Douglas, Professor Allison O. Larsen, and Professor Neal E. Devins.

I am known at the law school for being "the last car in the parking lot." I don't stop working until every assignment is completed and every page is read. I want to bring my passion and energy to the meaningful work of your chambers. I hope that you'll afford me the chance to interview and convey my excitement for the position.

Thank you for your consideration.

Sincerely,

Timothy Intelisano

TIMOTHY D. INTELISANO

40 Cornell Avenue | Cherry Hill, NJ | tdintelisano@wm.edu | (856) 986-9029

EDUCATION

William & Mary Law School, Williamsburg, Virginia
J.D. expected, May 2023
G.P.A.: 3.7, Class Rank: tied 13/218

Honors: ***William and Mary Journal of Race, Gender, and Social Justice***
CALI Excellence for the Future Award (highest grade), Advanced Constitutional Law Survey
Alternative Dispute Resolution Team
Election Law Fellow (merit-based research fellowship, work published by National Conference of State Legislatures)
Phi Delta Phi (class-rank distinction)
Teaching Assistant for Constitutional Law (Spring 2023)

Activities: Student Bar Association: 0L/1L Liaison, Peer Mentor
W&M Institute of Bill of Rights Law: 2022 Supreme Court Preview Podcast Host

The Pennsylvania State University, University Park, Pennsylvania
B.A, *summa cum laude*, Political Science, History minor, December 2019
G.P.A.: 3.99

Honors: Nancy and Joseph Birkle Student Engagement Award
R. Stewart Brunhouse Endowed Scholarship in the College of the Liberal Arts

Activities: Panhellenic Dance Marathon, Committee Member (2017-2019)
Pi Sigma Alpha (Political Science Honors Society), Executive Board Secretary

PUBLICATIONS

Note, *Beating Justice: Corporal Punishment in American Schools and the Evolving Moral Constitution*, 29 WM. & MARY J., RACE, GENDER, & SOC. JUST. (forthcoming 2023)

EXPERIENCE

The Honorable Yvette Kane — Harrisburg, Pennsylvania
U.S. District Court for the Middle District of Pennsylvania — August 2023 – August 2024
Law Clerk

Saul Ewing LLP — Washington, D.C.
Incoming Litigation Associate — Anticipated: Post Clerkship (s)

Saul Ewing Arnstein & Lehr LLP — Philadelphia, Pennsylvania
Summer Associate — May 2022 to July 2022
Wrote detailed memoranda on a wide range of topics, including higher education, federal environmental law, African E-Commerce tax policies, procedural due process, and the First Amendment. Consulted with fellow Summer Associates on group assignments related to NCAA "Name, Image, and Likeness."

The Honorable Craig L. Wellerson — Toms River, New Jersey
New Jersey Superior Court — May 2021 to August 2021
Judicial Intern
Authored bench memos for Judge Wellerson and performed extensive legal research. Debated the issues with the Judge and assisted in court as notetaker on motion days and at confidential settlement conferences. Composed opinion on an evidentiary ruling in a conspiracy case, filed in the Complex Business Litigation Program Database at NJ Courts.

Professor Neal E. Devins, William & Mary Law School — Williamsburg, Virginia
Research Assistant — May 2021 to August 2021
Consulted with Professor Devins and Professor Lawrence Baum on previous empirical studies of party polarization in Supreme Court and congressional decision making.

Interests: College Football, Distance Running, Binging TV Dramas (Succession, Billions, Ozark, Homeland)

WILLIAM & MARY LAW SCHOOL
OFFICE OF CAREER SERVICES

TIMOTHY D. INTELISANO

Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.
- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

Transcript Data

STUDENT INFORMATION

Name : **Timothy D. Intelisano**

Curriculum Information

Current Program

Juris Doctor

College: **School of Law**

Major and Department: **Law, Law**

*****Transcript type:WEB is NOT Official *****

DEGREES AWARDED

Applied: Juris Doctor **Degree Date:**

Curriculum Information

Primary Degree

College: **School of Law**

Major: **Law**

	Attempt	Passed	Earned	GPA	Quality	GPA

	Hours	Hours	Hours	Hours	Points	
Institution:	**72.000**	**72.000**	**72.000**	**61.000**	**225.40**	**3.69**

INSTITUTION CREDIT -Top-

Term: Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	101	LW	Criminal Law	B+	4.000	13.20	
LAW	102	LW	Civil Procedure	A-	4.000	14.80	
LAW	107	LW	Torts	A-	4.000	14.80	
LAW	130	LW	Legal Research & Writing I	B	2.000	6.00	
LAW	131	LW	Lawyering Skills I	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	**15.000**	**15.000**	**15.000**	**14.000**	**48.80**	**3.48**
Cumulative:	**15.000**	**15.000**	**15.000**	**14.000**	**48.80**	**3.48**

Unofficial Transcript

Term: Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	108	LW	Property	A-	4.000	14.80	
LAW	109	LW	Constitutional Law	A	4.000	16.00	
LAW	110	LW	Contracts	A-	4.000	14.80	
LAW	132	LW	Legal Research & Writing II	B+	2.000	6.60	
LAW	133	LW	Lawyering Skills II	H	2.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	**16.000**	**16.000**	**16.000**	**14.000**	**52.20**	**3.72**
Cumulative:	**31.000**	**31.000**	**31.000**	**28.000**	**101.00**	**3.60**

Unofficial Transcript

Term: Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	312	LW	Adv Issues in Con Law Survey	A+	3.000	12.90	
LAW	320	LW	Business Associations	A-	4.000	14.80	
LAW	398	LW	Election Law	A	3.000	12.00	
LAW	480	LW	First Amend-Religion Clauses	A-	3.000	11.10	
LAW	763	LW	Journal Race,Gender,& Soc Just	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	13.000	50.80	3.90
Cumulative:	45.000	45.000	45.000	41.000	151.80	3.70

Unofficial Transcript

Term: Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	140B	LW	Adv Writing & Practice: Civil	B+	2.000	6.60	
LAW	401	LW	Crim Proc I (Investigation)	P	3.000	0.00	
LAW	453	LW	Administrative Law	A	3.000	12.00	
LAW	628	LW	Race & Amer Legal History	B	3.000	9.00	
LAW	753	LW	St & Local Govt Externshp	P	1.000	0.00	
LAW	763	LW	Journal Race,Gender,& Soc Just	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	8.000	27.60	3.45
Cumulative:	58.000	58.000	58.000	49.000	179.40	3.66

Unofficial Transcript

Term: Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	115	LW	Professional Responsibility	A-	2.000	7.40	
LAW	400	LW	First Amend-Free Speech & Pres	A	3.000	12.00	
LAW	411	LW	Antitrust	A	3.000	12.00	
LAW	481	LW	Aca Freedom,Free Speech & Univ	P	1.000	0.00	

LAW	619	LW	Supreme Court Seminar		B+	2.000	6.60
LAW	700	LW	Directed Research		P	1.000	0.00
LAW	705	LW	Ind Legal Writing		A	2.000	8.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	12.000	46.00	3.83
Cumulative:	72.000	72.000	72.000	61.000	225.40	3.69

Unofficial Transcript

TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	72.000	72.000	72.000	61.000	225.40	3.69
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	72.000	72.000	72.000	61.000	225.40	3.69

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Spring 2023

Subject	Course	Level	Title	Credit Hours
LAW	309	LW	Evidence	4.000
LAW	393	LW	Campaign Finance Law	1.000
LAW	415	LW	Federal Courts	3.000
LAW	500	LW	SCOTUS & Police Interrogations	1.000
LAW	513	LW	Law and Politics	1.000
LAW	649	LW	Special Education Law	1.000
LAW	720	LW	Trial Advocacy	3.000

Unofficial Transcript

Davison M. Douglas
John Stewart Bryan Professor of Jurisprudence

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-3790
Fax: 757-221-3261
Email: dmdoug@wm.edu

April 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I strongly recommend Timothy D. Intelisano to be your law clerk. As a Professor of Law at William & Mary Law School for the past 32 years, I rank Mr. Intelisano in the top 5% of students I have known. He has all the skills necessary to be a superb law clerk.

Mr. Intelisano's greatest strength is his keen analytical skills. I have had him in two classes: The Religion Clauses of the First Amendment and Race and American Legal History. Whenever I had a challenging question, I would call on Mr. Intelisano because I knew he would always be prepared and have an analytical response to the reading materials. In answering the tough questions, Mr. Intelisano appeared very modest. I found him to be incredibly enthusiastic about the reading materials in both classes.

Mr. Intelisano also is a clear writer. I read the writing sample he gave to me, and I believe he would do a wonderful job as your law clerk. He has had experience drafting opinions and would be ready to work independently as your law clerk.

In addition, Mr. Intelisano is passionate about the law. You would find that having him in your chambers would be a source of great enthusiasm. His love of law is absolutely contagious.

If you have any questions, please call me, and I would gladly discuss his candidacy with you. My telephone number is 757-784-1850.

Sincerely,

/s/

Davison M. Douglas
John Stewart Bryan Professor of Jurisprudence

Allison Orr Larsen
Associate Dean for Research and Faculty Development, Engh Research Professor, Alfred Wilson & Mary I.W. Lee Professor of Law, and Director, Institute of the Bill of Rights Law

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-7985
Email: amlarsen@wm.edu

April 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a law professor at William and Mary Law School and a 3L student here, Tim Intelisano, has applied to be your law clerk. Tim is ranked 13th in his class, is a teaching assistant for Neal Devins (who only picks the best), is a leader among his peers, and an absolute delight to have in our building. I highly recommend Tim for the job.

I have been teaching at the law school for over a decade, and I am lucky enough to have taught absolutely marvelous students during that time, many of whom have gone on to do many great things with their legal career. Only a handful of those students, however, qualify as (and I say this as a compliment) true law school nerds. By “law school nerds” I mean people (like myself) who wake up every day eager to get to class and tackle the next legal puzzle. Tim Intelisano is a law school nerd, in the best possible way. He is a lover of the law, as they say, and it shows.

Tim was enrolled in my Advanced Con Law class in his second year of law school. This class is new for me, and it basically was created to tackle all the “leftover” Constitutional issues we don’t have time to teach in the required 1L class. From federal preemption to free speech to the Establishment Clause, Tim came to every class super prepared, ready to engage with me and with his peers, and honestly just refreshingly happy to be there. He does not shy from court decisions that contradict each other nor does he easily fall into the skepticism I see so often in his peers who are convinced that law does not matter. Instead, Tim fights through the contradictions looking for patterns and articulating explanations. He understands the stakes in the arguments he makes, and he is very good at making them. He has shared with me dreams of being a law professor one day and I understand why – Tim loves to learn the law.

As demonstrated by his stellar grades, Tim’s energy and enthusiasm has paid off. Tim absolutely dominated the exam I gave in Advanced Con Law. In a class full of excellent students, he wrote the very best exam in the bunch. I awarded Tim an A plus, which is a grade I only allow myself to award once every several years. His exam was so top notch he hit every issue I wanted him to spot and some I didn’t even anticipate. On the top of his exam (which is graded anonymously) I wrote a note to myself: “Model Answer. I am not sure even I could have done better.” Tim just a about repeated this performance in the spring semester when he took Administrative Law from me and earned another A. Tim’s exam in this class, like his previous one, demonstrated excellent legal analysis, clear writing, and a deep understanding of the themes I taught all semester.

Apart from his excellent legal analytical skills and enthusiasm for the law, Tim has another qualification that is important for potential law clerks: Tim is a genuinely nice guy. He laughs easily and connects with people effortlessly. Sometimes in office hours I find myself just chatting with him before I remember I am supposed to be answering his questions from class. He would be a great addition to a small chamber. Tim’s smile is broad, his manner is relaxed, and you can tell he is very happy to be doing what is his doing. Put simply, Tim gives us legal nerds a good name.
Please let me know if you have any questions. The best way to reach me is probably over e-mail or by my cell phone, (434) 249-1104.

Sincerely,

/s/

Allison Orr Larsen

Neal E. Devins
Sandra Day O'Connor Professor of Law
and Professor of Government

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Phone: 757-221-3845
Fax: 757-221-3261
Email: nedevi@wm.edu

April 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I strongly recommend Tim Intelisano for one of your clerkships. Tim is bright, energetic, and collegial. He is exceptional in many ways and was (with respect to class participation) the best student in my spring 2021 constitutional law class. Tim also served as a research assistant of mine in the summer of 2021—so I have a sense of his work ethic as well as the quality of his research and writing.

Let me start with Tim's classroom performance. For spring 2021, I taught remotely and that created challenges re getting a class of 70 to engage with assigned readings so that we could have robust nuanced conversations in class. I owe Tim a real debt for his joyful, exceptional participation. Tim, as they say, was really into it. He asked fantastic questions and made numerous astute observations. And he did so in such a cheerful enthusiastic way that it caught on. I wound up having one of my best classes ever and this never could have happened but for Tim and a couple of others.

Needless to say, I was happy to work with Tim as a summer research assistant. He was working for a judge too and juggled between the two of us. These arrangements often go sour because the juggling can be a challenge. Not with Tim. He stayed on top of his assignments and did exceptional research for a paper I am working on regarding the ways that political polarization impacts the Supreme Court as compared to Congress. Tim's work was particularly good because he was an active player in the research design—further distinguishing himself as someone willing to stake out positions and operate as a peer and not a subordinate (which is what the assignment called for).

Tim's level of engagement really is unsurpassed and his enthusiasm is contagious, not off putting. I think the world of him and encourage you to take a hard look at his applications. Please let me know if I can be of further assistance.

Sincerely,

/s/

Neal E. Devins
Sandra Day O'Connor Professor of Law
and Professor of Government

Timothy Intelisano
40 Cornell Avenue | Cherry Hill, NJ 08002
856-986-9029 | tdintelisano@wm.edu

WRITING SAMPLE

I prepared this memorandum during my 2L Advanced Civil Writing course. It is substantially my own work. For reference, the citations are to materials that were provided as part of the course and are not publicly available.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL STATEMENT OF ROBERT MONTBANK

COMES NOW Plaintiff Deborah Summers, individually and as guardian for Amanda Summers and Ronnie Summers, by and through her attorney, in support of the Motion to Compel EKKO Insurance Company to produce the Witness Statement of Roberta Montbank.

STATEMENT OF THE CASE

On the evening of September 3, 2021, Bruno Summers was shot and killed with a .22 caliber pistol at The Garage tavern in Ruston. (Entry 1, ¶¶ 1-4.) Mr. Summers was shot by Ed Hard, the ex-boyfriend of his widow, Deborah. (Entry 17, ¶ 2.) The death of Mr. Summers was the culmination of several altercations that had occurred between the pair. (Entry 17, ¶¶ 2-4, 6.) The two had fought inside The Garage two weeks prior to the shooting. (Entry 17, ¶¶ 1-2.) The deep animosity between them came to a head when Mr. Hard pulled a gun on Mr. Summers as he left the bathroom at The Garage on September 3rd (Entry 60, ¶ 3.) Mr. Hard fired one shot. (Entry 4, ¶ 10.) The bullet entered Mr. Summers' lower chest (Entry 11.) Blood began to pour out from Mr. Summers as he lay slain on the floor of tavern. (Entry 17, ¶ 8.) That evening, Hans and Gretchen Summers, the victim's parents were babysitting Amanda and Ronnie, Bruno's two children. (Entry 17, ¶ 5.) Upon learning about the shooting, Hans arrived at The Garage with Bruno's son, Ronnie. (Entry 17, ¶ 9.) Hans and eight-year-old Ronnie arrived in time to see blood pouring out of Mr. Summers. (Entry 1) Mr. Summers later died at Mercy Hospital. (Entry 17, ¶10.) On October 26, 2021, Roberta Montbank gave a statement to EKKO Insurance, the coverage provider for Mr. Davola and The Garage. (Assignment 73.) On November 1st, Plaintiffs filed suit against Mr. Davola and others, alleging OIED, among other claims. (Entry 35.) On November 3rd, Ms. Montbank gave another statement to the Metropolitan Police

Department. (Entry 60.) Defendants possess Ms. Montbank's statement to EKKO Insurance, but it has not been made available to the Plaintiffs. (Entry 48, ¶ 2.)

APPLICABLE LAW

Federal Rules of Civil Procedure 37 (A)(3)(a) permits a motion to compel discovery if a party fails to disclose a document required by Federal Rules of Civil Procedure 26. State of Major Rules of Civil Procedure 26 (b)(3) permits discovery of documents not made "in anticipation of litigation." Even if a court finds that a given document falls under the Work Product Privilege, parties can still show a "substantial need" to obtain the document, as well as an inability to obtain a "substantial equivalent" without "undue hardship." *Jude v. Harvey*, 284 Maj. 500 (2020).

ARGUMENT

Ms. Montbank's statement to EKKO Insurance Company was not made in "anticipation of litigation" and is accordingly discoverable under Major Rules of Civil Procedure 26(b)(3).

Should the court find that the statement was not part of the routine investigatory work of EKKO Insurance, Plaintiffs can clear both hurdles for overcoming the Work Product Privilege. Plaintiffs have a substantial need for the EKKO statement because of the brevity and inadequacy of the police statement that Ms. Montbank offered. (Entry 60.) Additionally, there is no substantial equivalent to Ms. Montbank's statement. Her memory issues have rendered her *de facto* unavailable. Thus, the "undue hardship" analysis is irrelevant to the question here, since no "substantial equivalent" exists.

I. Montback's Statement is Discoverable Because It Wasn't Collected in Anticipation of Litigation.

Ms. Montbank's statement was made in the course of standard investigatory work routinely conducted by insurance companies.

a. Montbank's statement was made prior to the filing of <u>any</u> litigation. Additionally, finding for Defendant Davola would have adverse public policy implications and could stifle discovery for litigants.

Ms. Montbank's statement could not have been made in "anticipation of litigation," because no suit had been filed when she gave her statement to EKKO Insurance. (Entry 60.) (Entry 35.) Insurance company records taken as part of preliminary investigations are discoverable if the records were not produced in anticipation of a suit being filed. *Jude*, 284 Maj. 500. The public policy consequences of an adverse ruling are troubling. *Jude*, 284 Maj. 3d 500 (Figment, J., dissenting). Should courts find that any investigatory action taken by an insurance company becomes undiscoverable – without even a tangential relationship to prospective litigation – it would slice the core out of MRCP 26(b)(3). The purpose of the Work Product Privilege is to protect the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative concerning the litigation." MRCP 26(b)(3). It is not meant to be a broad shield to render initial interviews conducted in "the ordinary course of the insured's business" undiscoverable by parties to litigation. *Jude*, 284 Maj. 3d 500 (Figment, J., dissenting).

Ms. Montbank gave her statement to EKKO Insurance on October 26, 2021. (Assignment 73.) Plaintiffs filed suit on November 1, 2021. (Entry 35.) Therefore, when Ms. Montbank sat down for her statement with EKKO Insurance, she had no reason to know that Mr. Davola would be named as a party in the action brought by Plaintiff. In fact, she had no reason to know that any such action <u>would ever exist.</u> Because no suit had been filed, and Montbank's

statement was made "in the ordinary course of the insured's business," the motion to compel discovery should be granted.

II. Even if This Court Finds That the Work Product Privilege Applies, Plaintiff Has a Substantial Need for the EKKO Statement, and There is No Substantial Equivalent Available.

b. The police statement is brief. Without additional information, the court will lack precise information about details salient to Plaintiffs' OIED claim.

The brevity of Montbank's police statement strengthens Plaintiffs' claim that there is a substantial need to see her EKKO Insurance Statement. When undertaking the substantial need inquiry, "[t]he clearest case for ordering production is when crucial information is in the exclusive control of the opposing party." *Jude*, 284 Maj. 3d 500. Moreover, a substantial need cannot be proven for mere periphery factual scans or a desire to "unearth damaging admissions." *Id.*

Here, EKKO Insurance maintains exclusive control over the statement. (Entry 48.) Plaintiff also does not seek the statement for the purpose of pursuing irrelevant background information or "damaging admissions." *Jude*, 384 Maj 3d. 500. Montbank is not a party to the case nor do Plaintiffs see her a bombshell witness. Montbank's recollections are however extremely pertinent to the OIIED claim. For Plaintiffs to prevail on the merits, they must "first prove a causal link between what the plaintiff observed at the scene and the resulting emotional distress. Second, the plaintiff must establish the emotional distress with evidence showing a manifestation of objective symptoms." *Gordon v. Guterson,* 367 Maj. 3d 540 (2018). Witness statements reveal that both Hans Summers, Bruno's father, and his son Ronnie, arrived at The Garage in the moments after the shooting. (Entry 17, ¶ 9.) Ronnie suffered from PTSD after seeing his father bleed profusely from the fatal gunshot wounds. (Entry 54, P.153.) What he saw,

who was there, and the exact parameters of the Emergency Medical Services team's attempt to save the deceased is pertinent to what Ronnie "observed at the scene. . . ." *Gordon*, 367 Maj. 3d 540. Accordingly, there is a substantial need for Montbank's statement, which would supplement and likely supplant her police statement. The Plaintiff can meet their burden of showing substantial need.

c. There is NO substantial equivalent to Ms. Montbank's EKKO statement.

Since there is no substantial equivalent to Montback's EKKO Statement, the motion to compel should be granted. The second hurdle of MRCP26(b)(3) demands that a court set aside a claim of Work Product Privilege, if in addition to showing "substantial need" for the documents at issue, plaintiffs also show an "inability to obtain the equivalent without undue hardship." *Bottom Corp. v. Major*, 271 Maj. 3d 100 (2019). In *Jude*, the Court found that the availability of the defendant to testify could serve as the substantial equivalent of a statement he gave to his insurance company. 284 Maj. 3d 500 ("The more important fact is that the statement in question is that of the defendant. The defendant is not unavailable."). The defendant in that case had also given no indication that he had any memory issues relating to the facts that gave rise to the litigation. *Id.*

This case is not like *Jude*. Here, there is no substantial equivalent available to Plaintiffs because Ms. Montback has already conceded to having memory issues regarding the contents of her original statement. (Entry 48, ¶ 2.) These memory issues render her *de facto* unavailable for the purposes of the Rule 26 analysis.

The police statement's deficiency combined with Montbank's memory issues make it imperative for Plaintiffs to see what is in the EKKO Insurance Statement. OIED claims require

as much precision and detail as possible. This is due to the wide range of emotional responses that individuals have to traumatic events. *See Noe v. Flowers*, 281 Maj. 3d 400 (2014). However, since courts have already recognized that family members who arrive at the scene are "foreseeable plaintiff[s]" and "that the plaintiff [must] prove that the plaintiff's observations of the injured victim caused emotional distress. . ." it is essential to Plaintiffs case that the details in the wake of the shooting be made available for any finder of fact. *Id.* Accordingly, because there is no substantial equivalent to Montbank's EKKO Insurance Statement, Plaintiffs' Motion to Compel should be granted.

CONCLUSION

Wherefore the Plaintiffs respectfully ask the Court to grant the motion to compel.

Respectfully submitted,

Deborah Summers

By: /s/ Timothy Intelisano
Of Counsel

Applicant Details

First Name	**Devin**
Middle Initial	**P**
Last Name	**Iorio**
Citizenship Status	**U. S. Citizen**
Email Address	**di4850a@american.edu**
Address	**Address** Street **4545 Connecticut Ave NW Apt 406** City **Washington DC** State/Territory **District of Columbia** Zip **20008** Country **United States**
Contact Phone Number	**6314873696**

Applicant Education

BA/BS From	**Trinity College**
Date of BA/BS	**May 2021**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 19, 2024**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Administrative Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Alvina Reckman-Myers First Year Moot Court Competition** **WCL Moot Court Honor Society Spring Qualifying Tournament**

Evan A. Evans Constitutional Law Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ginsburg, Jessica
sardburg@aol.com
703-927-8270

Allen, Emily
emily.allen@usdoj.gov
(907) 271-4724

Hildum, Robert
Robert.hildum2@dc.gov
202-442-9094

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Devin Iorio

4545 Connecticut Ave NW, Washington D.C. | (631) 487-3696 | di4850a@american.edu

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby St
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at American University's Washington College of Law and am writing to apply for a 2024-2025 Term Law Clerk position with your chambers. As an aspiring criminal attorney with hopes of practicing in Virginia, as well as strong passions for litigation and public service, I believe that a clerkship with your chambers is the ideal way to begin my legal career.

Through my professional and academic experiences, I have developed strong research and writing skills as well as a vigorous sense of initiative and work ethic. Last summer, I had the opportunity to intern with the U.S. Office of Special Counsel Disclosure Unit where I worked closely with attorneys to interview, research, and evaluate the claims of federal whistleblowers. As a Summer Law Clerk, my legal writing abilities were sharpened by drafting letters to federal agencies, congressional committee chairs, and the President. Additionally, I have continued to enhance my legal abilities through subsequent internships in Judge Beryl A. Howell's chambers in the U.S. District Court for the District of Columbia and the D.C. U.S. Attorney's Office. In these roles, I acquired practical firsthand experience by observing federal and local hearings, drafting legal memoranda, and assisting attorneys with case preparation.

I will continue to hone my legal skills through my ongoing participation as a member of the American University Criminal Law Practitioner, Moot Court Honor Society, and Administrative Law Review. I will also be able to further familiarize myself with criminal law next spring while working on cases referred from the Montgomery County Public Defender's Office as part of WCL's Criminal Justice Clinic.

I believe the knowledge and perspectives I have obtained from these experiences are readily applicable to a judicial clerkship and make me a strong candidate for a position with your chambers.

Please find attached my resume, writing sample, transcript, and letters of recommendation for your review. I would be happy to provide any further information you may require. Thank you for your time and consideration.

Sincerely,

Devin Iorio

Devin Iorio

4545 Connecticut Ave NW, Washington, D.C. | (631) 487-3696 | di4850a@american.edu

EDUCATION

American University Washington College of Law, Washington, D.C.
Juris Doctor Candidate | Top 25% May 2024
Honors: Admin. L. Rev. Volume 75.1 Notice of Superior Work | International Law Highest Grade Designation | Kenneth & Patricia Auberger Endowed Scholarship
Activities: Administrative Law Review, *Articles Editor* | Moot Court Honor Society, *Communications Committee* | Criminal Law Practitioner, *Articles Editor*

Trinity College, Hartford, CT
Bachelor of Arts in American Studies and Public Policy and Law, *cum laude* May 2021
Honors: Faculty Honors (2018-2020) | First-Year Papers Award (2018) | Catalyst Leadership Corps Scholar (2019) | Judy Dworin Award (2021)
Activities: Mock Trial Team, *Executive Board* | Pi Kappa Alpha Fraternity
Publication: Iorio, Devin, *An Analysis of Racialized Housing Segregation in America*, The Trinity Papers (June 14, 2021) https://digitalrepository.trincoll.edu/trinitypapers/97/.

EXPERIENCE

WCL Criminal Justice Clinic Defense Section, Washington, D.C.
Student Attorney Jan. 2024 – May 2024
- Will represent adults facing misdemeanor charges, juveniles, and individuals serving life sentences without parole for offenses committed as juveniles in cases referred from the Montgomery County Public Defender's Office.

U.S. Securities and Exchange Commission Office of the General Counsel, Washington, D.C.
Scholars Program Intern June 2023 – Aug. 2023
- Assist Adjudication Division attorneys in suspension, revocation, and follow-on administrative proceedings.
- Draft recommended agency orders and conduct research regarding Commission precedent and relevant statutes.

United States Attorney's Office for the District of Columbia, Washington, D.C.
Intern Jan. 2023 - April 2023
- Assisted attorneys in the Capitol Siege Section of the Criminal Division with exhibit preparation and motion drafting.
- Performed relevant research, drafted legal memoranda, and observed ongoing proceedings.

U.S. District Court for the District of Columbia, Washington, D.C.
Judicial Intern to Judge Beryl A. Howell Aug. 2022 – Dec. 2022
- Conducted legal research and drafted legal analytical memoranda concerning a range of pending civil and criminal matters including discrimination claims, sentencing disputes, executive agency actions, and education law issues.
- Attended and observed proceedings in civil and criminal matters, including trials and sentencing and motion hearings.

Office of Special Counsel Disclosure Unit, Washington, D.C.
Summer Law Clerk May 2022 – Aug. 2022
- Interviewed federal whistleblowers, evaluated disclosures, researched pertinent laws and regulations, and drafted internal memoranda and correspondence assessing whether disclosures supported a likelihood of wrongdoing determination.
- Drafted letters conveying determinations to federal agencies, congressional committee chairs, and the President.

Primus Project, Hartford, CT
Archival Research Associate May 2021 – Aug. 2021
- Researched, collected, organized and summarized Trinity College's historic relationship to slavery and slave culture.

Trinity College, Hartford, CT
Teaching Assistant Aug. 2019 – Dec. 2019
- Led study and peer review sessions in American Legal History to aid student brief writing and public speaking skills.

Suffolk County Legal Aid Society, Riverhead, NY
Intern May 2019 – Aug. 2019
- Shadowed attorneys in courtroom, jail, and judicial chambers and assisted in client intake and case preparation.

INTERESTS

Hiking | Mountain Biking | Cooking

LAST	FIRST	M	AU ID	BIRTH	SEX
IORIO	DEVIN	P	4424850	03/20	M

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06/09/23	1 OF 1

Washington College of Law
ACADEMIC RECORD

AMERICAN UNIVERSITY
WASHINGTON, DC

Course Number	Course Title	Hnr	Crs Val	Grd	Quality Points
FALL 2021					
	DEGREE OBJECTIVE: JURIS DOCTOR				
LAW-501-002	CIVIL PROCEDURE		04.00	A-	14.80
LAW-504-002	CONTRACTS		04.00	B+	13.20
LAW-516-009	LEGAL RESEARCH & WRITING I		02.00	B	06.00
LAW-522-002	TORTS		04.00	B+	13.20
	LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 47.20QP 3.37GPA				
SPRING 2022					
LAW-503-002	CONSTITUTIONAL LAW		04.00	A	16.00
LAW-507-002	CRIMINAL LAW		03.00	A	12.00
LAW-517-009	LEGAL RESEARCH & WRITING II		02.00	B+	06.60
LAW-518-002	PROPERTY		04.00	B+	13.20
LAW-660-002	INTERNATIONAL LAW		03.00	A	12.00
	LAW SEM SUM: 16.00HRS ATT 16.00HRS ERND 59.80QP 3.73GPA				
FALL 2022					
LAW-508-003	CRIMINAL PROCEDURE I		03.00	B	09.00
LAW-601-002	ADMINISTRATIVE LAW		03.00	A	12.00
LAW-769-001	SUPERVISED EXTERNSHIP SEMINAR EXTERNSHIP SEMINAR		02.00	A-	07.40
LAW-770F-001	ADMINISTRATIVE LAW REVIEW I		01.00	--	--.--
LAW-847-003	APPELLATE ADVOCACY		03.00	A	12.00
LAW-899-001	EXTERNSHIP FIELDWORK		03.00	P	00.00
	LAW SEM SUM: 15.00HRS ATT 14.00HRS ERND 40.40QP 3.67GPA				
SPRING 2023					
LAW-550-004	LEGAL ETHICS		02.00	A-	07.40
LAW-611-001	BUSINESS ASSOCIATIONS		04.00	B	12.00
LAW-633-002	EVIDENCE		04.00	A	16.00
LAW-770S-001	ADMINISTRATIVE LAW REVIEW I		01.00	--	--.--
LAW-795PY-001	CONST POWERS OF THE PRESIDENCY		03.00	A	12.00
LAW-871SC-002	MOOT COURT COMPETITION		02.00	P	00.00
	LAW SEM SUM: 16.00HRS ATT 15.00HRS ERND 47.40QP 3.64GPA				

LAW CUM SUM: 61.00HRS ATT 59.00HRS ERND 194.80QP 3.60GPA
END OF TRANSCRIPT

Hilary T. Lappin
Registrar

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Office of the Law School Registrar
4300 Nebraska Ave., NW, Suite C107
Washington, DC 20016-2132

BACHELOR OF LAWS/JURIS DOCTOR

The Degree of Bachelor of Laws was re-designated the Juris Doctor degree by the Board of Trustees of The American University on October 15, 1968. The J.D. degree is conferred nunc pro tunc as of the date of the student's actual graduation from the Washington College of Law.

GRADES (Calculated in grade point average)

Effective Fall 1968 through Summer Session 1975 the Law School used the following 3.00 grading system:

A=3; B+=2.5; B=2; C+=1.5; C=1; D=0.5; F=0.

Effective Fall 1975 the Law School converted to a 4.00 grading system:

A=4; B+=3.5; B=3; C+=2.5; C=2; D=1; F=0.

Effective Fall 1997 the Law School used the following 4.00 grading system:

A=4; A-=3.7; B+=3.3; B=3; B-=2.7; C+=2.3; C=2; D=1; F=0.

Effective Fall 2019 the Law School used the following 4.00 grading system:

A=4; A-=3.7; B+=3.3; B=3; B-=2.7; C+=2.3; C=2; C-=1.7; D=1; F=0.

GRADES (Not calculated in grade point average)

IP	In Progress	P	Academic Pass in Pass/Fail Course
L	Audit	FZ	Academic Fail in Pass/Fail Course
--	Grade not yet recorded	W	Withdrew

ACCREDITATION

American University Washington College of Law is fully accredited by the American Bar Association (ABA) and by the Middle States Association of Colleges and Schools (MSA).

Jessica A. Ginsburg
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sardburg@aol.com
703-927-8270

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to strongly recommend Devin Iorio for a clerkship in your chambers.

Devin was a student in my Externship Seminar at the American University Washington College of Law during the fall of 2022. This class was a companion to the externship Devin completed with Chief Judge Beryl Howell from the Federal District Court for the District of Columbia. The seminar required students to reflect -- both in class and in written journals -- on issues in legal practice as well as on their externships. Another key requirement was to design and deliver a presentation.

Devin was one of my most engaged and enthusiastic students during the semester. Devin always contributed actively to class discussions. He often was the first to volunteer a response to a question – which I particularly valued as the seminar ran from 8 – 10 pm, not exactly the prime slot to motivate class participation. His comments were always thoughtful and on point.

Devin's communication skills are very strong. His journals and papers were thoughtful and well written. He was an exceptionally gifted presenter with excellent presence.
Devin has all the attributes to make him an excellent addition to your Chambers' staff. He is collegial and friendly, dedicated and hard working. I strongly recommend him for employment as a law clerk.

Please don't hesitate to contact me if there is any additional information I can provide.

Sincerely,

Jessica A. Ginsburg
Adjunct Professor
American University
Washington College of Law

U.S. Department of Justice

United States Attorney
District of Alaska

James M. Fitzgerald U.S. Courthouse &
Federal Building
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567

Commercial: (907) 271-4724
Email: emily.allen@usdoj.gov

May 25, 2023

To whom it may concern,

I had the pleasure of working with Devin Iorio during his Spring 2023 semester internship at the U.S. Attorney's Office in the District of Columbia. I am one of the many AUSAs around the country detailed to the District of Columbia's U.S. Attorney's Office to prosecute cases arising out of the January 6, 2021, attack on the Capitol. Devin was assigned to our Capitol Siege Section for his semester-long internship at our Office.

Throughout the semester, Devin worked on legal and factual issues to prepare criminal cases for trial, and in between assignments he observed many of the goings-on at the federal courthouse. In a case I was preparing for trial, he helped our team put together trial exhibits based on the data-packed and difficult to read text message extractions of a defendant's cell phone. His final product was polished, accurate, and simple to understand—exactly what we needed to give the jury a useful peek into the defendant's correspondence. In the same case, Devin helped draft a persuasive legal brief, arguing against a defendant's motion to sever his case from the co-defendant he claimed was more culpable. Devin ably combined some existing draft briefs in similar cases to the specific facts of our case and put together a draft that helped persuade the judge that severance was unwarranted.

My work with Devin was entirely virtual, since I am based far away from Washington, D.C. But he was always available, approachable, and enthusiastic. He easily overcame challenges and found ways to plug in and participate. In addition to providing valuable and prompt work, Devin was a positive and welcome presence on our team. He was always eager to contribute and looked for more ways to engage with the work. Devin has a great deal to contribute and I am confident he will find every success.

Sincerely,

Emily W. Allen
Assistant U.S. Attorney

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my understanding that Devin Iorio has applied for a clerkship. I write to enthusiastically support his application.

Devin was one of my students in "advance Appellate Practice" in the Fall of 2022. The course was rigorous and encompassed a full review of appellate practice and procedure. Devin is an excellent student and achieved an A in the class which required substantial class participation, two writing assignments and oral argument. My worry about hiring new lawyers and clerks is their writing ability. I can attest that Devin's written work was excellent and I am confident that he will be immediately productive for you.

In addition to his academic work, Devin early emerged as a leader in the class. His participation was always inciteful and creative. More impressive to me was his encouragement to his classmates and the suggestions he provided me for the assignments and the class in general. He has already displayed a maturity and professionalism that will serve him well as he begins his legal career.

Devin is a gifted student with impeccable character. Without hesitation I highly recommend him to you.

Please do not hesitate to reach out to me if I can provide any further information.

Sincerely,

Robert J. Hildum Administrative Law Judge District of Columbia Office of Administrative Hearings robert.hildum2@dc.gov 202-747-4392

Devin Iorio

4545 Connecticut Ave NW, Washington D.C. | (631) 487-3696 | di4850a@american.edu

The following writing sample is an appellate brief written for my Fall 2022 Appellate Advocacy class. I was required to draft a brief arguing that summary judgement was properly granted by the trial court because the COVID-19 vaccine mandate imposed by the Mayor of the District of Columbia on District employees was both *ultra vires* and violated the Due Process Clause of the Fifth Amendment. I was required to perform all research for this assignment independently. To reduce length, I have omitted all but the second section of my argument dealing with the substantive due process issue. I would be happy to send the complete document upon request.

ARGUMENT

The Superior Court correctly granted Plaintiffs' Motion for Summary Judgement pursuant to D.C. Civil Rule 56. Order at 16. Appellate courts review grants of summary judgment *de novo*. *See e.g.*, *Joyner v. Sibley Mem'l Hosp.*, 826 A.2d 362, 368 (D.C. 2003). "A motion for summary judgment should be granted whenever the court concludes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* When making this determination, courts must draw all reasonable inferences in a light most favorable to the party opposing summary judgment. *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016).

On appeal, as at the trial court, the opposing party bears the burden of presenting specific facts showing that there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 243, 247-48 (1986) ("only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment."). The opposing party must "show [that] there is [more than] some metaphysical doubt as to material facts." *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Mere allegations or denials are insufficient to defeat a proper summary judgment motion. *Anderson*, 477 U.S. at 248.

II. The Superior Court correctly granted Plaintiffs' Motion for Summary Judgement because the vaccine mandate violates substantive due process by infringing on a fundamental right in the absence of a compelling state interest. Additionally, even if this Court does not find a fundamental right at issue, the Court should still hold that the mandate violates substantive due process because it does not survive rational basis review and is gravely unfair in light of the manner it was implemented and its consequences.

The District's governing bodies are subject to the limitations of the United States Constitution. *See* U.S. CONST. art. I, § 8, cl. 17. As such, these bodies must comport with both the procedural and substantive components of the Due Process Clause of the Fifth Amendment.

See Griswold v. Connecticut, 381 U.S. 479, 504 (1965). Procedural due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Alternatively, substantive due process prohibits governmental actions that infringe upon an individual's fundamental rights. *Griswold*, 381 U.S. at 485. Courts examining encroachments on fundamental rights will only uphold government action if it is narrowly tailored to addressing a compelling state interest. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). To meet the narrowly tailored component of this high bar, courts demand that the state action be the least restrictive means of addressing its compelling interest. *See id.* Courts have also recognized that substantive due process protects individuals from grave unfairness by prohibiting "deliberate flouting of the law that trammels significant personal or property rights." *Tri Cnty. Indus. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (quoting *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988)). In such circumstances, government action may be deemed constitutional only if it is rationally related to a legitimate government interest. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). Courts recognize that due process rules, by nature, are not "subject to mechanical application in unfamiliar territory." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *see also Moore v. E. Cleveland*, 431 U.S. 494, 546 (1977) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."). Here, Plaintiffs' challenge the substantive effects of Defendants' gravely unfair actions on Plaintiffs' rights, rather than the process by which those rights were affected.

A. Defendants' mandate violates Plaintiffs' substantive due process rights by infringing on their fundamental right to bodily integrity by essentially overriding Plaintiffs' ability to refuse medical treatment in the absence of an overriding justification and medical appropriateness.

The fundamental right to bodily integrity safeguards an individual's ability to refuse medical treatment. *See In re Walker*, 856 A.2d 579, 586 (D.C. 2004); *In re A.C.*, 573 A.2d 1235, 1247 (D.C. 1991); *Feds for Med. Freedom v. Biden*, ("*Feds"*) 581 F. Supp. 3d 826, 832 (S.D. Tex. 2022). Government action that essentially overrides this ability constitutes a violation of substantive due process in the absence of an overriding justification and medical appropriateness. *See Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Jacobson*, 197 U.S. at 12; *Does v. District of Columbia*, 374 F. Supp. 2d 107, 118 (D.D.C. 2005).

Government action infringes on the fundamental right to bodily integrity when it essentially overrides an individual's ability to refuse medical treatment. *See In re Walker*, 856 A.2d at 586; *In re A.C.*, 573 A.2d at 1247; *Feds*, 581 F. Supp. 3d at 832. In *In re A.C.*, a trial court violated a pregnant and unconscious patient's due process rights by authorizing a caesarean without the consent of the patient or a guardian. 573 A.2d at 1252. The trial court failed to respect the patient's right to bodily integrity by employing an interest balancing approach, rather than "ascertain[ing] what the patient would do if competent." *Id.* at 1245, 1249, 1252 (declaring the constitutional magnitude of the right to forego medical treatment). The court indicated that the viability of an individual's ability to refuse medical treatment is of paramount importance in due process determinations. *See id* at 1248. This principle extends beyond *In re A.C.*'s fact pattern and must be analyzed in all unwanted medical treatment claims. *See, e.g., In re Walker*, 856 A.2d at 586. In *Feds*, a Presidential vaccine mandate was enjoined, in part, because it posed a threat of irreparable harm by creating a "Hobson's choice" for federal employees between "their jobs and their jabs." 581 F. Supp. 3d at 832. The court found that "no legal remedy

adequately protects the liberty interests of employees who must choose between violating a mandate of doubtful validity or consenting to an unwanted medical procedure that cannot be undone." *Id.* Conversely, in *Jacobson*, the Court upheld a statute authorizing municipalities to impose five-dollar fines on adult inhabitants who refused to receive a smallpox vaccination. 197 U.S. at 12. While finding the state action permissible under these circumstances, the Court left open the possibility that future mandates may be rendered objectionable by their context and manner of imposition. *See id.* at 38-39.

Government intrusions on the fundamental right to bodily integrity violate substantive due process when they are not narrowly tailored to address circumstances indicating an overriding justification and medical appropriateness. *See Harper*, 494 U.S. at 221-222; *Jacobson*, 197 U.S. at 12; *Does*, 374 F. Supp. 2d at 118. In *Harper*, a policy allowing for inmates to be involuntarily administered antipsychotic medication was found to be narrowly tailored to the state's intensive interest in promptly treating mentally ill patients and running a safe prison. *See* 494 U.S. at 229, 236. These compelling interests were complemented by safeguards such as the temporary nature of the drugs and reoccurring continuation review hearings. *See id.* Similarly, in *Jacobson*, the Court permitted infringement on the right to bodily integrity in the context of the raging smallpox epidemic. 197 U.S. at 28. The Court likened this liberty limitation to the government's ability to compel military service during periods which pose an existential threat to the nation. *See id.* at 39. Alternatively, the *Does* court found that a policy authorizing elective surgical procedures on behalf of mentally disabled persons "without adequately attempting to ascertain their wishes" was impermissible absent overriding justification. 374 F. Supp. 2d at 108. The court explained that it could not deem the practice

medically appropriate given the non-essential nature of the surgeries and the multiple less restrictive alternatives of achieving the policy's goal. *See id.* at 118.

In this case, Defendants' mandate violates Plaintiffs' fundamental right to bodily integrity by essentially overriding their ability to refuse medical treatment. *See* Pls.' Mot. at 33. As evidenced by Plaintiffs' denied request for a disciplinary requirement exception, the mandate, like the policy in *In re A.C.*, did not allow Plaintiffs to meaningfully effectuate their unwillingness to vaccinate. *See id.* at 8. Although *In re A.C.* represents a brazen overpowering of one's personal rights, the same underlying issues are applicable in circumstances like those in *Feds* and at hand where several factors create the same effect. Similarly, in *Feds*, the mandate forces Plaintiffs to choose between subjecting themselves to unwanted medical treatment or suffering irreparable harm. *Id.* at 35-36. Additionally, non-compliant officers would suffer irreparable harm because they would not only be stripped of their careers, reputations, benefits, and pensions, but would also face significant threats to future employment and potentially their own safety. Order at 3. Current rates of violence against police indicate that officers stripped of badges and guns would face higher levels of personal danger than individuals terminated from other professions who do not have to live among those they previously arrested. *See* Eric Levenson & Josh Campbell, *Shootings of Police Officers Highlight a Rise in Violence & Distrust*, CNN (Oct. 17, 2022) https://www.cnn.com/2022/10/17/us/police-violence-ambush-attack. Being that multiple jurisdictions, including D.C. and Maryland, have prohibited previously terminated officers from subsequent law enforcement employment, non-compliant officers would be required to either abandon the profession and seek alternative work, likely at a significant pay cut, or relocate to a jurisdiction without such prohibitions and hope that none are subsequently enacted. *See* D.C. Act 23-336, Subtitle K; Md. Code Ann., Pub. Safety § 3-212.

These consequences starkly contrast the five-dollar fee levied against vaccination objectors in *Jacobson* and evidence the Hobson's choice that essentially overrides Plaintiffs' ability to refuse medical treatment.

Defendants' mandate violates substantive due process because it is not narrowly tailored, and current circumstances render relevant state interests non-compelling. Order at 4. The interests identified in *Harper* are far less dynamic than the District's interest in compelling vaccination because the prompt medication of mentally ill prisoners is vital to the safe operation of prisons regardless of surrounding circumstances. Conversely, the District's interest has necessarily fluctuated as new information, statistics, and societal trends have emerged. Consequently, the District's near absolute vaccination rate, drastic decline in COVID-19 rates, and rise in telework all cut against a compelling need for such invasive action. *See District of Columbia, DC COVID-19 Vaccine Tracker*, THE COLUMBUS DISPATCH, https://data.dispatch.com/covid-19-vaccine-tracker/district-of-columbia/district-of-columbia/11001/ (Nov. 2, 2022) [hereinafter *DC COVID-19 Vaccine Tracker*]. These circumstances are readily distinguishable from those considered in *Jacobson* to be at caliber with times of war. Considering current conditions and modern medical knowledge, the District's interest in coercing employees to vaccinate is incomparable with the interest in 1905 Massachusetts where the "prevalent and increasing," smallpox virus posed a near existential threat to communities. This modern medical knowledge provides the basis for the multiple less restrictive alternatives to a vaccine mandate that Defendants could have employed to protect community health. Like in *Does*, the presence of less restrictive alternatives like masking mandates, testing for natural immunity, and retaining the test out option indicates that the state action was not narrowly tailored. Defendants' mandate is in fact even more restrictive than the

actions taken in *Does*, *Harper*, or *Jacobson* by virtue of its permanent impact and lack of what effectively amounted to a five-dollar[1] buy-out fee. Thus, Defendants' mandate is neither narrowly tailored nor aimed at a compelling government interest.

B. Even if this Court does not find a fundamental right at issue here, the Court should nonetheless hold that the mandate violates substantive due process because it was implemented through a process that did not consider public concerns, levies substantial consequences on those it affects and is not justified by circumstances that establish a rational basis for such measures.

Government action violates substantive due process when the manner in which it occurs and the consequences it inflicts renders the action gravely unfair in light of the basis for which the action was taken. *See Moore*, 431 U.S. at 503-05; *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Garvey v. City of N.Y.*, 2022 N.Y. Misc. LEXIS 6209 at *20 (Sup. Ct. Oct. 24, 2022); *Silverman*, 845 F.2d a 1080; *Tri Cnty. Indus.*, 104 F.3d at 459; *In re Walker*, 856 A.2d at 586; *Bauer v. Summey*, 568 F. Supp. 3d 573, 593 (D.S.C. 2021).

Government action is considered gravely unfair if it occurs through an improper process and infringes on an individual's personal or property rights by imposing substantial consequences on those affected. *See Moore*, 431 U.S. at 503-05; *Silverman*, 845 F.2d a 1080; *Tri Cnty. Indus.*, 104 F.3d at 459; *In re Walker*, 856 A.2d at 586. In *Silverman*, the court rejected allegations that the District violated due process by denying permission to convert a rental apartment building to condominium apartments. 845 F.2d at 1074. The denial was found constitutional because the plaintiff could not show that state officials acted gravely unfair in a "flouting of the law that trammels significant personal or property rights." *Id.* at 1080. The totality of the circumstances indicated that the District's decision was a product of "confusion" rather than deliberation. *Id.* Under a similar standard, the *Moore* Court invalidated a zoning

[1] Five dollars in 1905 would be the equivalent of approximately $172 in 2023 when adjusted for inflation.

ordinance which impaired liberty interests of extended family members in living together. *See* 431 U.S. at 503-05. The Court reasoned that the ordinance effectively required individuals to choose between maintaining their constitutionally protected property or personal rights. *See id.* No justification could be found that would outweigh the consequences inflicted on "family life-style decisions" through a process lacking the procedural safeguards needed to respect constitutional rights. *Id.* at 512 (J. Brennan concurring); *see also Tri County Indus.*, 104 F.3d at 459 ("[T]he manner in which the violation occurs as well as its consequences are crucial factors to be considered."). In *Walker*, this court struck down a policy authorizing the involuntary administration of temporary antipsychotic medication and emphasized the importance of the process by which policies impose their restrictions in due process determinations. 856 A.2d at 586 (explaining that administration of unwanted drugs can survive challenge only if there are procedural safeguards to ensure consideration of patient interests).

Gravely unfair government action is constitutionally permissible only where it is sufficiently tied to and justified by a legitimate state interest. *See Romer*, 517 U.S. at 632; *Garvey*, 2022 N.Y. Misc. LEXIS 6209 at *20; *Bauer*, 568 F. Supp. 3d at 593. In *Romer*, the Court applied rational basis review and held that an amendment to a state constitution which precluded government action protecting the status of homosexuals was unconstitutional. *See* 517 U.S. at 635. The Court drew a distinction between the amendment's "immediate objective" and its "ultimate effect" when deciding that the amendment and its "severe consequence[s]" are insufficiently related to a legitimate state interest. *Id.* at 626-27. Rational basis review was also applied in *Bauer* to evaluate multiple mandatory COVID-19 vaccine requirements levied on employees and affiliated personnel throughout South Carolina. 568 F. Supp. 3d at 593-94. In finding that a rational basis existed, the court primarily focused on evidence and precedent

relating to the low vaccination rates and surges in variant COVID-19 cases which were present at the time of the courts review. *See id.* at 595-96. In contrast, similar circumstances were addressed more recently in *Garvey* where a New York City vaccine mandate was declared unconstitutional. 2022 N.Y. Misc. LEXIS 6209 at *20-22. The court found that the mandate was not rationally related to a legitimate state purpose because, at the time of review, "nearly 80%" of the city had been vaccinated, the State's temporary state of emergency had lapsed, the vaccine had proven not to provide absolute protection, and even President Biden had declared that the pandemic was over. *Id.* at *19-21.

Defendants' mandate is gravely unfair because it was implemented through an improper process and imposes substantial consequences on Plaintiffs' personal and property rights. Unlike in *Silverman*, Defendants' actions were not the product of government confusion but rather a deliberate process that failed to properly respect Plaintiffs' rights. Order at 11. As in *Walker*, Defendants crafted no procedural safeguards to consider Plaintiffs' interests and in fact actively avoided such consideration by failing to provide an adequate notice and comment period when adopting 6-B DCMR § 2001.2. *See id*. This failure to adhere to rulemaking requirements is especially problematic being that the process occurred just months after vaccines were approved for public use and thus did not consider the many legitimate concerns held by Plaintiffs and others during those early and confusing days. *Id.* at 2, 10. The inadequacy of this process only becomes more damning when juxtaposed with the immense consequences of its product. These consequences are akin to those evaluated in *Moore* in that they create a substantial burden by effectively requiring Plaintiffs to choose between maintaining their interests in continued employment and earned benefits and their personal rights to refuse unwanted medical treatment.

These consequences, combined with the invalid rulemaking process and the vaccine's permanent nature, demonstrate that Defendants' mandate constitutes gravely unfair government action.

Defendants' mandate violates substantive due process because it is not reasonably related to and justified by a legitimate state interest. As made clear in *Bauer* and *Garvey*, the District's interest in compulsory vaccination must be evaluated under the totality of current circumstances. Unlike *Bauer* where the state's interest was evidenced by low vaccination rates and an ongoing surge of COVID-19 variant cases, the District's population is near completely vaccinated and infection rates have plummeted. *See DC COVID-19 Vaccine Tracker*. While the pandemic was undoubtably a unique and daunting period which may have justified more expansive government action, this period has lapsed and thus analysis of government conduct must adjust accordingly. This change occurred gradually but has been acknowledged by government figures like the Mayor who recognized the end of the public health emergency in February 2022, and President Biden who declared the pandemic over in September 2022. Ayana Archie, *Joe Biden says the COVID-19 Pandemic is Over*, NPR (Sept. 19, 2022) https://www.npr.org/2022/09/19/1123767437/joe-biden-covid-19-pandemic-over. Additionally, Defendants' mandate would likely serve to decrease rather than increase public safety by pushing out unvaccinated officers during a period of heightened rates of violent crime and MPD staffing shortages. *See* Compl. Ex. 8. Applying the rationale used in *Romer*, current day factors differentiate Defendants' proffered immediate interest in compelling employees vaccination and the mandate's ultimate effect of unreasonably burdening Plaintiffs. As in *Garvey*, these current circumstances coupled with the vaccine's non-absolute protection do not evidence a reasonable relation between Defendants' mandate and a legitimate government purpose. Hence, Defendants' vaccine mandate violates substantive due process.

Applicant Details

First Name	**Madison**
Last Name	**Irene**
Citizenship Status	**U. S. Citizen**
Email Address	**mwirene@outlook.com**
Address	**Address** Street **2435 Tara Lane** City **South San Francisco** State/Territory **California** Zip **94080**
Contact Phone Number	**(716)-392-7318**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2021**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 15, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Marion Rice Kirkwood Moot Court Competition 2023-2024**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate, Prison Litigation**

Recommenders

O'Connell, Anne
ajosephoconnell@law.stanford.edu
Tyler, Ron
rtyler@law.stanford.edu
650-724-6344
Letter, Dean's
deansletter@law.stanford.edu
650-723-4455
Zambrano, Diego
dzambrano@law.stanford.edu
Reese, Elizabeth H.
ereese@law.stanford.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Madison Irene
2435 Tara Lane, South San Francisco, CA 94080 | (716) 392-7318 | mwirene@stanford.edu

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at Stanford Law School and write to apply to serve as your law clerk for the 2024-25 term. I am especially excited to work for someone who values public interest work.

I believe that I have the skills required to assist you in your work. I do well in fast-paced environments, have an incredibly strong work ethic, and have sharp analytical skills. While I do not have legal experience post law school, I do have work experience outside the legal profession. I have worked a wide array of jobs including having worked as a cake decorator, janitor, nursing home assistant, bartender, and busser. I also come from a low-income background and I greatly appreciate the impact and importance that the legal system has in people's lives.

Enclosed please find my resume, references, law school transcript, and writing sample for your review. Professor Anne Joseph O'Connell, Professor Elizabeth Reese, Professor Ron Tyler, and Professor Diego Zambrano are providing letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Madison Irene (she/her)

MADISON IRENE

2435 Tara Lane, South San Francisco, CA 94080 | mwirene@outlook.com | 716-392-7318

EDUCATION

Stanford Law School, Stanford, CA — Juris Doctor, expected June 2024
- Honors: John Paul Stevens Public Interest Fellowship ($5,000 scholarship for public interest legal work), High Pro Bono Distinction (150 hours of law-related pro bono work)
- Journal: *Stanford Law Review* (Volume 76: Articles Committee Editor, Volume 75: Member Editor)
- Activities: Stanford Latinx Law Students Association (Co-President), Stanford Law Association (Academic Co-Chair)

The University of Chicago, Chicago, IL — Bachelor of Arts in Psychology, June 2021
- Activities: Institute of Politics Pritzker Fellows Program (Team Leader), Mock Trial

EXPERIENCE

MacArthur Justice Center — New Orleans, LA
Law Clerk — August – September 2023

Constitutional Accountability Center — Washington D.C.
Law Clerk — June – July 2023

Native Law Pro-Bono Project — San Francisco, CA
Legal Volunteer — September 2022 – Present
Aide tribal members by working on expungement cases and conducting research on the new legal landscape of the Indian Child Welfare Act (ICWA).

Prisoner Legal Services Pro-Bono Project — San Francisco, CA
Legal Volunteer — September 2021 – Present
Create accessible legal resources for incarcerated persons on common problems they often face, including how to write and file § 1983 claims, engage in custody proceedings, and file for missed stimulus checks.

San Francisco Public Defender's Office — San Francisco, CA
Legal Intern — June – August 2022
Contributed to the representation of indigent defendants charged with felony offenses. Drafted complex pleadings including bail motions, post-trial Romero motions, and motions to suppress. Regularly appeared on the record in court for arraignments, motions, and felony preliminary hearings. Conducted legal research and participated in investigations to build clients' defense strategies.

Gary Comer College Prep — Chicago, IL
Teacher's Aide — December 2017 – June 2021
Taught tenth grade World Literature class to 50 students in a high school on Chicago's South Side.

Illinois Justice Project — Chicago, IL
Policy Intern — June – August 2020
Participated in policy development and implementation meetings with senior staff involving topics such as police brutality, juvenile justice, and bond reform. Wrote anti-child trafficking policy proposals for the Illinois Juvenile Justice Leadership Council. Conducted independent research project evaluating the Cook County child welfare system.

Cook County State Attorney's Office — Chicago, IL
Policy Intern — January – June 2020
Drafted legislation with the potential to change Sex Offender Registration laws to restrict the number of people required to register. Wrote policy report evaluating Domestic Violence Misdemeanor sentencing schemes.

ADDITIONAL INFORMATION

- Interests: Enjoy figure skating, painting floral arrangements, and writing letters.

MADISON IRENE

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RECOMMENDERS

Professor Anne Joseph O'Connell
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REFERENCES

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Nadia Iqbal
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Alicia Thesing
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Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Irene,Madison W
Student ID : 06634578

Print Date: 06/10/2023

-------- Academic Program --------

Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

-------- Beginning of Academic Record --------

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	P	
Instructor:		Freeman Engstrom, David				
LAW	205	CONTRACTS	5.00	5.00	P	
Instructor:		Sanga, Sarath				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	P	
Instructor:		Thesing, Alicia Ellen				
LAW	223	TORTS	5.00	5.00	P	
Instructor:		Mello, Michelle Marie Studdert, David M				
LAW	241A	DISCUSSION (1L): WHY IS THE USA EXCEPTIONAL -- IN CRIME AND PUNISHMENT?	1.00	1.00	MP	
Instructor:		Weisberg, Robert				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:		O'Connell, Anne Margaret Joseph				
LAW	207	CRIMINAL LAW	4.00	4.00	P	
Instructor:		Fan, Mary D.				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Bakhshay, Shirin				
LAW	2402	EVIDENCE	5.00	5.00	P	
Instructor:		Fisher, George				

LAW TERM UNTS: 14.00 LAW CUM UNTS: 32.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Kelman, Mark G				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	P	
Instructor:		Bakhshay, Shirin				
LAW	2001	CRIMINAL PROCEDURE: ADJUDICATION	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	7010A	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	3.00	P	
Instructor:		Liu, Goodwin Hon				
LAW	7081	FAMILY LAW II: PARENT-CHILD RELATIONSHIPS	3.00	3.00	P	
Instructor:		Banks, Ralph Richard				

LAW TERM UNTS: 16.00 LAW CUM UNTS: 48.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	3504	U.S. LEGAL HISTORY	3.00	3.00	P	
Instructor:		Ablavsky, Gregory R				
LAW	5040	LAW, LAWYERS, AND TRANSFORMATION IN DEMOCRATIC SOUTH AFRICA	3.00	3.00	P	
Instructor:		Liu, Mina Titi O'Connell, James				
LAW	7030	FEDERAL INDIAN LAW	3.00	3.00	P	
Instructor:		Reese, Elizabeth Anne				
LAW	7836	ADVANCED LEGAL WRITING: APPELLATE LITIGATION	3.00	3.00	MP	
Instructor:		Makhzoumi, Katherine				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Irene,Madison W
Student ID : 06634578

LAW TERM UNTS: 16.00 LAW CUM UNTS: 64.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	2.00	0.00		
Instructor:		Fisher, Jeffrey				
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	P	
Instructor:		Zambrano, Diego Alberto				
LAW	6004	LEGAL ETHICS: THE PLAINTIFFS' LAWYER	3.00	3.00	P	
Instructor:		Engstrom, Nora Freeman				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	P	
Instructor:		Freeman Engstrom, David				

LAW TERM UNTS: 10.00 LAW CUM UNTS: 74.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	904A	CRIMINAL DEFENSE CLINIC: CLINICAL PRACTICE	4.00	0.00		
Instructor:		Horne, Carlie Ware Tyler, Ronald				
LAW	904B	CRIMINAL DEFENSE CLINIC: CLINICAL METHODS	4.00	0.00		
Instructor:		Horne, Carlie Ware Tyler, Ronald				
LAW	904C	CRIMINAL DEFENSE CLINIC: CLINICAL COURSEWORK	4.00	0.00		
Instructor:		Horne, Carlie Ware Tyler, Ronald				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 74.00

END OF TRANSCRIPT

Anne Joseph O'Connell
Adelbert H. Sweet Professor of Law
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
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ajosephoconnell@law.stanford.edu
650 736.8721

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write, with great enthusiasm, to recommend Madison Irene—an integral member of our law school community and one of our most committed public interest students—for a clerkship in your chambers. Unlike almost all of her peers at Stanford Law School, Madison worked more than full-time hours in high school to help support her family as a janitor, cake decorator, and Starbucks barista, among other jobs. As a law student, she gives more than any other student I am writing for this year to others—from selecting articles for the Stanford Law Review to co-running the Stanford Latinx Law Students Association, which hosted an astounding gala featuring Health and Human Services Secretary Xavier Becerra that likely involved more planning and fundraising than a decent-sized wedding.

I first met Madison in January 2022 when she was assigned to my Constitutional Law section, along with sixty-one other students. The nine-week mandatory class for first-year students covers the powers of and limits on the federal courts, Congress, and the President, as well as the powers of and limits on the states. It is not an easy class. In addition to the final examination, I require students during the quarter to write one response paper on their own or with up to two partners (with the option of writing a second paper and having the higher score count in the final grade) and to make an (ungraded) oral presentation tied to recent district court litigation. Combining her response paper and final examination, Madison earned a strong Pass grade in my class.

Writing with a classmate, Madison submitted a persuasive response paper—analyzing how the primary methods of interpretation (textualism, intratextualism/structuralism, originalism, pragmatism/living constitutionalism, and precedentialism) feature in McCulloch v. Maryland and deciding which method provides the most compelling justification for the Court's decision. Madison and her partner nicely summarized and applied each method. For instance, they noted: "In this decision, originalism wasn't the most dominant method of interpretation, but it was used to bolster important moments." They perceptively added: "In McCulloch, pragmatic claims were often used to support originalist claims." Overall, in an organized and clearly written essay, they showed how Chief Justice Marshall "most effectively used textualism/intratextualism and pragmatism in McCulloch."

Although receiving a score above the mean, Madison and her partner decided to write a second response paper—comparing the legislative veto and line-item veto on doctrine and on policy grounds. In a solid essay, they argued against the Supreme Court's decisions barring these tools. I was particularly struck by their compelling analysis of the line-item veto: "What the [line item veto] provides is a mechanism by which the Executive and Legislative branches can perform a negotiation of sorts in passing certain legislation. The ample checks that each branch provides on the other through the process provides protection enough against aggrandizement of either branch."

In the primary evaluative tool in my class, a timed and difficult take-home examination, Madison shined on the broader-ranging question—specifically, on how concerns of government workability and individual liberty are related, including their connections and gaps, doctrinally and normatively. While initially noting the tension between government workability and individual liberty, she smartly pointed out that cases, including the Chinese Exclusion Cases and Gonzales v. Raich, implicating government workability "often involved an expansion of the federal government's powers, which then logically begins to raise concerns of government overreach and the need to protect individual liberty."

Madison demonstrated doctrinal comprehension in the two thorny issue spotters: one on the federal regulation of intrastate waters that provide a habitat for migratory birds and endangered species (focusing on Congress's power and limits) and one on proposed revisions to the selection and removal of inspectors general (focusing on separation of powers and the Appointments Clause). She has a good command of complex doctrine.

For the oral "argument," assigning students the district court materials in Missouri v. Biden, I had Madison represent the United States defending against Spending Clause challenges to the Biden Administration's COVID-19 vaccine mandates for federal contractors. It was one of the strongest oral presentations in the class. Madison also showed her ability to process and coherently explain complex legal material orally throughout the quarter when I called on her. She addressed questions on precedentialism, the Commerce Clause, and policy concerns about delegation, among other topics.

In sum, I am a big fan of Madison. Fewer than eight percent of federal law clerks are Latinx. Madison should obtain a clerkship because of her legal knowledge, genuine and diverse interests in the law, strong writing, and exceptional human decency—and

the judiciary's role in shaping the legal careers of recent graduates. If you should need any additional information, please contact me at (415) 710-8475 (cell) or at ajosephoconnell@law.stanford.edu. I would be delighted to talk more about Madison.

Sincerely,

Anne Joseph O'Connell
Adelbert H. Sweet Professor of Law

Law Clerk, Judge Stephen F. Williams
Law Clerk, Justice Ruth Bader Ginsburg

Ronald C. Tyler
Professor of Law
Director, Criminal Defense Clinic
559 Nathan Abbott Way
Stanford, California 94305-8610
650-724-6344
rtyler@law.stanford.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to urge your consideration of Madison Irene for a judicial clerkship.

I am the Director of Stanford's Criminal Defense Clinic. I taught Madison during the spring quarter of 2023. Due to the small size of the clinic, I get to know my students well.

When Madison applied for clinic during her 1L summer, her scholastic and personal background made her an intriguing applicant. I was struck by the significant years of public service by someone so young. During the entirety of her undergraduate education at the University of Chicago, Madison worked as a teacher's aide on the South Side of Chicago, teaching world literature to tenth graders. I was impressed to learn that she developed culturally responsive lesson plans and lectures. The breadth of Madison's other pre-law experiences was also noteworthy: she worked at a domestic violence nonprofit, a criminal justice reform agency, and at the Cook County State's Attorney's Office. As I formed my clinical cohort, I saw a real benefit from Madison's openness to competing perspectives. That flexibility would also serve her well in a clerkship.

Madison's law school coursework and activities were also important determinants for successful clinical work. In her application materials, Madison shared that her enjoyment of Evidence and Criminal Procedure strongly influenced her decision to apply to my clinic. Her comfort with legal doctrine was reassuring. I was also heartened by her involvement in the Prisoner Legal Services Pro Bono Project teaching creative writing to inmates. That work demonstrated Madison's facility with the written word and her steadfast commitment to public service.

Madison's lack of Honors grades during her 1L year was not an impediment to her selection for my clinic. I have found that relying on the results of Stanford's grade normalization within a pool of academic high achievers unfairly excludes many fine students. Instead, I took into account Madison's exemplary record at the University of Chicago, where she was on the Dean's List every semester. I was also mindful of her background as a first-generation student from a low-income family. Madison shared that she worked 40-50 hours a week, even in high school. Her father was largely absent during her childhood, due to addiction. Her mother struggled with serious mental health issues. Madison excelled in spite of those considerable impediments. With her academic preparation and her lived experience, I was confident that Madison was up to the challenge of my clinic.

In the recent Criminal Defense Clinic term, students worked on behalf of individuals facing state misdemeanor charges. Student pairs undertook actual representation, including motions work and evidentiary hearings (under close supervision). As the primary point of contact with our clients, students were expected to develop the necessary rapport for effective, holistic representation. Within the ten-week quarter, they were expected to acquire doctrinal and advocacy skills, conduct factual and legal investigation, file motions, and conduct evidentiary hearings. Not everyone excels under the strain of these numerous responsibilities. Madison performed well. She demonstrated solid achievement in fundamental lawyering skills, all readily transferable to the judicial clerkship context.

Madison was always eager to learn and grow. As she described it, she was "open and sponge-like" for every faculty supervision session. Her legal writing skills improved steadily over the course of the quarter. Madison and her partner prepared a multi-pronged suppression motion on behalf of their client. Through meticulous investigation, they discovered evidence that seriously undermined the proffered basis for the traffic stop. They crafted arguments challenging the seizure, highlighting the prolonged detention, and forcefully asserting the unconstitutional nature of the search of their client.

Madison worked conscientiously with her clinic partner as the hearing date approached. They refined their brief. They mooted cross examinations and oral argument. They identified defense experts to rebut potential prosecution testimony. Then, on the day the prosecution's brief was due, the district attorney abruptly dismissed the case. Madison was elated for her client, even though the dismissal meant that her work on the brief ended, and her chance for in-court advocacy evaporated. Still, Madison benefited greatly from her clinic experience, including focused instruction on legal writing. She is a solid writer who will continue to gain proficiency in her 3L year, given her editing responsibilities on the *Stanford Law Review*.

Beyond her growing legal acumen, what impresses me most about Madison is her drive. She pushed herself to meet the challenges of learning and executing case strategy on the clinic's tight spring schedule. Even when she was sidelined by illness, Madison insisted on continuing to work remotely, as soon as she was able. I believe I understand the source of her tenacity: over

her lifetime, Madison has experienced real adversity that is foreign to most of her classmates. Still, she rises. Still, she thrives.

I heartily recommend Madison Irene for a judicial clerkship.

Sincerely,

/s/ Ronald C. Tyler

Ron Tyler - rtyler@law.stanford.edu - 650-724-6344

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

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Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

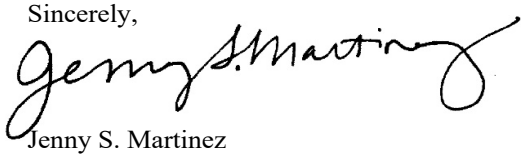
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Diego A. Zambrano
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559 Nathan Abbott Way
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dzambrano@law.stanford.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Madison Irene for a clerkship in your chambers. Madison was a good student in my Advanced Civil Procedure class. She was intelligent, engaged with the material, and professional. Madison is a passionate student, deeply involved in the *Stanford Law Review* and the Stanford Law Latino Student Association. Madison's most defining features are her passionate commitment to social justice and her devotion to understanding how law affects society on the ground. Coming from a difficult upbringing with a single mother, Madison has devoted her legal career to civil rights and public defense. If you're looking for a student devoted to social justice and how the law affects the less fortunate, Madison is it. I believe she would be a good clerk.

Madison was a student in my Advanced Civil Procedure class. As you may know, this class provides instruction in some of the most important and foundational concepts in our litigation system, including class actions and multidistrict litigation. I, therefore, have a unique view of Madison's aptitude for litigation and the way our judiciary operates. I can tell you that she is a committed law student who stays on top of the material and is devoted to the substantive effects of law on society. Madison's qualities shine through her thought-provoking discussions on the intricate interplay between procedural and substantive justice. In Advanced Civ Pro, Madison consistently demonstrated a solid capacity to zoom out and grasp the tangible ramifications of civil procedure on the protection of substantive rights. Actively participating in classroom deliberations, she would raise normative considerations, such as critically questioning the effectiveness of class actions in safeguarding vulnerable litigants and delving into the delicate equilibrium between judicial efficiency and fairness to individuals.

Let me say a word about Madison's deep involvement outside the classroom. She plays a significant role as the Stanford Law Latino Student Association President. This experience is particularly challenging because Madison had to deal with a difficult time at the law school where diversity and inclusion issues were at the forefront. And the job is demanding. She has had to manage a 15-person board, plan and execute a series of events (bringing alumni and community together), support pan-affinity efforts, and host a series of meet-ups with alumni. In this role, she met frequently with Dean Martinez and other members of the Administration. Madison told me how she had to channel student concerns and questions to members of the Administration. She focused on building a community among the student body. I've seen her leadership on this front. Recently at an alumni event, Madison spoke to an audience of 200 people.

In my time getting to know Madison, I have seen her display moral righteousness and passionate defense of the less fortunate. Again, it is clear that Madison is motivated by a deep sense of social justice. Many of her questions and comments represent a perspective concerned with access to justice and the fairness of the legal system for under-resourced parties. Sometimes I get the impression that Madison considers herself an activist, deeply committed to racial issues of diversity and inclusion. She is so committed to these issues that they come up in many conversations with Madison. I believe one of her goals is to help Stanford Law School better support its minority students. Madison has also been involved in some contentious activities at the Law School as the president of SLLSA. She definitely embraces a perspective closer to critical legal studies. It's clear that Madison's profound commitment to these issues is central to her identity, her legal package, and her time at the Law School. One slight worry is that Madison is so deeply committed to these issues that she often forgets the broader context and can let herself be guided by ideology.

Madison's commitment to making a meaningful impact extends beyond the classroom, as evidenced by her active engagement in various extracurricular pursuits. Notably, she dedicates her time and expertise to three pro bono projects, including the Native Law and Prisoner Legal Services initiatives, which are highlighted on her resume. In addition to these endeavors, Madison goes above and beyond by volunteering as a creative writing instructor for inmates at the San Mateo County jail through her involvement with the Stanford Prisoner Abolition and Resources Coalition (SPARC). This commitment spans across her 1L and 2L years, with plans to continue into her 3L year. Furthermore, during the Winter Quarter of her 2L year, Madison served as a Legal Assistant for Professor Reese, where she played a pivotal role in evaluating the diverse civil procedure code adoption and amendment processes among federally recognized tribes. Currently, she actively participates in the Criminal Defense Clinic, collaborating with a fellow student to craft and present a compelling Motion to Suppress that engages with pressing legal issues. Looking ahead, Madison is set to participate in Moot Court next year, further honing her advocacy skills and deepening her understanding of the law.

From the onset of her law school journey, Madison has also harbored a profound interest in public defense work. This enthusiasm prompted her to secure a summer internship in the felony division at the esteemed San Francisco Public Defender's Office.

During her time there, Madison drafted numerous pre-trial and post-conviction motions but also stood on the record in court, arguing bail motions and preliminary hearings. She emerged as the intern with the highest number of on-the-record arguments in her intern class, a testament to her dedication. After this experience, her interest in criminal appellate and post-conviction work grew, prompting her to contemplate alternative avenues within the criminal justice system. Furthermore, Madison's law school journey presented her with unexpected opportunities for exploration, as she discovered a genuine affinity for classes like Civil Procedure, which sparked her contemplation of civil rights litigation and constitutional litigation. Despite coming from a low-income background and being cognizant of the financial realities of pursuing such paths, Madison made a conscious decision to prioritize her passion for public interest law. This decision was evident when she navigated the law firm interview process, ultimately opting not to pursue any callbacks as her heart and mind were steadfastly dedicated to public service. Madison is brimming with excitement to embark on an eight-week stint at the Constitutional Accountability Center in Washington, D.C., where she will contribute to SCOTUS and federal appellate amicus briefs, intertwining progressive originalism arguments.

Let me also mention Madison's upbringing in a low-income family, where she was raised by a single mother coping with mental health issues and an absent father struggling with addiction. This undoubtedly instilled in her a deep sense of resilience. Despite the chaotic and tumultuous nature of her early years, Madison found solace in a vibrant community that provided support and guidance. Madison told me that when she entered college, her desire to create meaningful change for individuals like her friends and family led her to major in psychology, initially considering social work or psychiatry. However, she told me that it was an internship at a Domestic Violence Legal Clinic that ignited her passion for justice reform and litigation.

The bottom line is this: Madison is a good student; a future civil rights attorney or public defender; passionately committed to social justice and critical legal studies; professional and decent; as well as a hard worker.

Sincerely,

/s/ Diego A. Zambrano

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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write with my very strong recommendation of Madison Irene for a clerkship position in your chambers. Madison is an incredibly hard worker, a dedicated student and campus leader, and she will be a great clerk.

I have gotten to know Madison very well since she decided to take my Federal Indian Law class in the Fall of her 2L year. Madison clearly worked exceptionally hard in my class. I could tell from the way she showed up to class every day with piles of notes and nodding along as I was making certain points during lecture. She was deeply invested in the subject matter in a way that was, frankly, inspiring for me as an instructor.

Madison came to office hours almost every week to ask me questions. Madison's questions were always a mix of two types that impressed me for different reasons. First, there were the deep and insightful questions that reflected how truly in the weeds she was with all the material. Those were impressive for the obvious reasons. But then there were the basic questions. These were incredibly impressive and helpful for a different reason. This was the first time I was teaching Federal Indian Law, and so I was really worried about doing a good job. Veteran law professors just know what part of the material is hard for students to grasp year after year, and so they emphasize it naturally. As a new Professor, I was in the dark about what key parts of the material I was not doing a good job explaining. It was Madison and her dedication to the class and really understanding it that let me know what I needed to explain better or go over again. This was so impressive to me because it is a testament to her desire to really understand the material and get the issues right—above her own ego. I can't tell you how many law students are worried about appearing smart, and so they don't ask the important basic questions. They worry they will look dumb, when it is really me who needs to know what I am messing up! It's students like Madison who have a pure dedication to understanding the material that are the reason I can be a good teacher. I also think this will be an incredibly important asset for her as a clerk. From my own clerkship experiences, I know how often you are dropped into many different areas of the law that you have no experience with. The job is figuring it out, and there is no room for ego and assumptions that you know more than you do. Madison will be the kind of clerk who will work her tail off late into the night and try her hardest to get it right. She won't make the kind of lazy or stupid mistakes that frustrate you. It is simply not in her character or her nature.

I was a bit heartbroken to see that Madison just missed the cutoff for an "H" in my class. I know she understands the material. Based on her exam compared to my conversations with her, it seems like she simply is not very good at taking law school exams. Now that I have seen the rest of her transcript, I expect that it reflects the same thing. She is smart and exceptionally hard working; she just has not figured out how to perform well on these very specific kinds of exams. It is a more common problem for students like Madison who are from low-income families without the same connections and resources to focus them on that kind of test-taking skill acquisition.

After taking my class, Madison applied to be one of my research assistants. I had the upmost confidence hiring her, even though she had not earned an H in my class. I knew she would work hard and do an excellent job, and that is exactly what she did. I had Madison working with a team of students tracking down tribal court civil procedure codes. It was a heavy research lift, and Madison's work was fantastic!

A final word about Madison's character and leadership qualities. She is one of the co-presidents of the Stanford Latinx Law Association. That is an incredibly demanding leadership role on campus, and she has served in it brilliantly. Madison is an incredibly humble person. As I mentioned before, she does not have an ego. But she puts herself forward to do things she cares about because she thinks it is important. It makes her approach to her leadership positions and the communities she is a part of feel particularly caring. That sense of care is infectious. If you hire her as a clerk, she will not be the loudest person in the room. She will be the person in the room quietly working her tail off and keeping everyone honest.

I strongly encourage you to hire Madison. She will be a great clerk and a fantastic lawyer. She has a strong head on her shoulders that will keep her grounded throughout her legal career. You will enjoy having her as a clerk you can stay in contact with over the years, just as I will.

Sincerely,

/s/ Elizabeth H. Reese

MADISON IRENE

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Writing Sample

I drafted the attached writing sample as an independent directed research project in my second year of law school. This note has been submitted, but at this time has not yet been accepted, for publication. For my note, I analyzed *Heck* doctrine and did an analysis of how some lower courts have been applying *Heck* to block § 1983 over-detention lawsuits. I performed all of the legal research, writing, and citations for this paper entirely on my own. My faculty supervisor for this project provided one round of feedback, which included three general and brief organizational comments. No line edits have ever been made on this piece by anyone else.

What The *Heck* Is Going on With Over-Detention: How Courts Are Using Habeas to Block § 1983 Suits, and Why They're Wrong To Do So

By: Madison Irene

Abstract

Whether one is acquitted, has their charges dismissed, or has their full sentence served, a person is not "free" until jailers actually effectuate his or her release. Since 1994, the U.S. Supreme Court has held that certain § 1983 claims brought by incarcerated and formerly incarcerated folks cannot be heard, because they must first be heard in habeas proceedings. This is a result of Heck *doctrine and its progeny. This Note specifically focuses on over-detention claims being brought under § 1983, and whether or not they can be barred by* Heck *doctrine. There are two main types of over-detention cases focused on in this Note. The first is 'classic' over-detention where the plaintiff's legal sentence date has passed yet they are still being detained. The second type is sentence calculation over-detention where the plaintiff alleges that some type of calculation error has been made which has or will keep them over-detained.*

This Note is the first to look at Heck *doctrine as it's being applied to over-detention cases. In addition to synthesizing and analyzing the different ways in which courts are applying Heck to § 1983 over-detention claims, this Note argues that* Heck *doctrine should not bar § 1983 suits for 'classic' over-detention situations, proposes a method of analysis for analyzing some of the trickier sentence calculation cases, and finally, pushes back against the mechanisms some of the courts seem to be developing.*

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Introduction

In 2017, a Louisiana state auditor report found that state prisons and local jails were over-detaining people for weeks, months, and in some cases years, in large part due to an inadequate system for calculating sentences.[1] In one extreme case, a man was imprisoned for three years past his judge ordered release date.[2] While many others are over-detained for a smaller amount of time, they all suffer from a denial of their fundamental right to liberty. The mind boggling aspect of over-detention cases are their factual simplicity. An extension of false imprisonment[3], classic over-detention cases involve a release date that is uncontested by both the state and the prisoner, but for whatever reason the prisoner was not released from incarceration on that date.

Take Johnny Traweek, for example. Mr. Traweek was sentenced to twenty two days of jail time in New Orleans in 2018.[4] Mr. Traweek had decided to take a plea deal, not because he believed he was guilty, but because he wanted to get out of jail quickly and figured that if he took a plea he would be credited with time served.[5] He was right.[6] Or at least he should have been. After pleading guilty the judge granted Mr. Traweek's sentence as time served; however, Mr. Traweek was not released from jail for another twenty-two days.[7] Once released Mr. Traweek filed a § 1983 lawsuit against the jail and the sheriff's office.[8] The sheriff's office, however, is currently arguing that Mr. Traweek's claim is legally unable to be heard because it is

[1] Richard A. Webster & Emily Lane, *Louisiana Routinely Jails People Weeks, Months, Years After Their Release Dates*, TIMES-PICAYUNE, Feb. 21, 2019, https://www.nola.com/news/article_988818dd-2971-51c8-82d5-096eef5ffba5.html.
[2] *Id.*
[3] *False Imprisonment*, BLACK'S LAW DICTIONARY (11th ed., 2019).
[4] Webster & Lane, *supra* note 1.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

barred by *Heck* doctrine.[9] If upheld, this would leave Mr. Traweek without access to a § 1983 remedy for his constitutional wrong.

The impacts of this would be devastating as the problem of over-detention extends far beyond Mr. Traweek. In 2023, the U.S. Department of Justice released an investigative report finding that Louisiana "incarcerates thousands of individuals each year beyond their legal release dates in violation of the Fourteenth Amendment."[10] In Baltimore, a class action lawsuit was filed providing evidence that between March of 2004 and June of 2005 somewhere between 2,200 and 1,000 over-detentions occurred.[11] In 2019 another lawsuit was filed against Baltimore Central Booking, this one estimating that out of a 100-case sample, "Baltimore detainees lose a collective eight years of freedom annually."[12] These are only a few of the many lawsuits that have been filed where people have been incarcerated for extended periods of time beyond their release date.[13] But despite this being such a clear cut problem, courts have struggled to identify a common solution to properly remedy these constitutional harms.[14] Similarly there is a notable absence of academic literature on over-detention. This Note is the first to focus on *Heck* doctrine and how it's being applied in some courts to over-detention cases.

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[9] Brief for Petitioner at 18, Traweek v. Gusman, (2022) (No. 19-1384-MLCF-JVM).
[10] U.S. DEP'T OF JUST., INVESTIGATION OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS (2023) [hereinafter DOJ INVESTIGATION OF LDPSC], https://www.justice.gov/d9/pressreleases/attachments/2023/01/25/2023.1.25_ldoc_findings_letter_final_508_0_0.pdf.
[11] Danny Jacobs, *'Overdetention' Claim in Central Booking Lawsuit Thrown Out*, DAILY RECORD, Mar. 3, 2015, https://thedailyrecord.com/2015/03/03/overdetention-claim-in-central-booking-lawsuit-thrown-out/.
[12] Lea Skene, *Detainees 'Unconstitutionally' Held at Baltimore Central Booking Long After court Grants Release, Lawsuit Claims*, BALT. SUN, Mar. 16, 2022, https://www.baltimoresun.com/news/crime/bs-md-ci-cr-lawsuit-claims-overdetention-20220316-4sr7qvlgmvdfbk33ttwffs666y-story.html.
[13] *See* Matt Reynolds, *California Can't Even Count, Ex-Inmate Says*, CAL. COURTHOUSE NEWS SERVICE, Feb. 21, 2013, https://www.courthousenews.com/california-cant-even-count-ex-inmate-says/; ACLU of Hawaii, *Overdetention Case Will Go To Trial*, ACLU, Jan. 15, 2010, https://www.aclu.org/press-releases/prison-overdetention-case-will-go-trial; David Reutter, *$731,000 Jury Award to Illinois DOC Prisoner Held 23 Months Beyond Release Date, Over $210k in Fees Awarded As Well*, PRISON LEGAL NEWS, Nov. 2021, https://www.prisonlegalnews.org/news/2021/nov/1/731000-jury-award-illinois-doc-prisoner-held-23-months-beyond-release-date-over-210k-fees-awarded-well/.
[14] *See infra* Part III.A.

In *Heck v. Humphrey* the Court introduced the case as lying "at the intersection of the two most fertile sources of federal-court prisoner litigation . . . 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254."[15] *Heck* was not the first time that habeas procedure and § 1983 had come into tension with one another, and it would not be the last. *Heck* resulted in a unique holding that would become known as the *Heck* bar.[16] The *Heck* bar states that if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence" then the § 1983 claim is barred by *Heck* in federal court and instead must first go through habeas procedure.[17] Only if the plaintiff is successful in state or federal habeas may they then seek damages through a § 1983 suit.[18] Throughout *Heck* the Court also specifically mentions confinement, writing that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that *necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement*."[19]

Over-detention cases don't neatly fit into *Heck*. Because while § 1983 claims on the basis of over-detention do not imply the invalidity of the prisoner's conviction or sentence, they do directly challenge one's confinement. So the question becomes, are § 1983 claims for over-detention barred by *Heck*? There are very real and serious consequences to the answer of this question. For example, there are major downsides to over-detaining folks. Not only does it affect the liberty rights of those who remain incarcerated, but it's also pricey. In one singular Louisiana case "[a]t an average cost of $54.20 per day to house an inmate, that's an extra $120,107

[15] Heck v. Humphrey, 512 U.S. 477, 480 (1994).
[16] *Id*.
[17] *Id*. at 487.
[18] *Id*.
[19] *Id*. at 486 (emphasis added).

taxpayers spent- not including the court settlements that came later."[20] And not only is over-detention costly to tax-payers, but when prisoners are not released on time they can lose placements they secured for housing, treatment programming, or any jobs they had lined up. [21] Meaning that even if the individual is over-detained for a few days or a week it can still have devastating consequences on their life.

Having access to § 1983 as a remedy is an important tool for combatting systemic over-detention; without which incarcerated and formerly incarcerated folks lack tools at their disposal to hold the system accountable and seek remedy for themselves. For one thing, the amounts of time folks are typically over-detained for often is often not long enough to go through habeas.[22] Even if a habeas motion is immediately filed at the point of over-detention it is unlikely it will ever be heard in time to reach a verdict before the plaintiff is released.[23] Therefore, civil tort actions are the only means by which the government can be held accountable for their actions.[24] Another thing is that § 1983 remedies typically far surpass state civil tort remedies both in their efficiency, the ability to request punitive damages, and timeliness of payout if successful.[25] In Louisiana, for example, due to lack of a state funds to payout civil law suits all civil state tort acts where the plaintiffs are successful get added to a list.[26] Every so often a few million dollars will be budgeted to be dispersed to the plaintiffs on the list until their total award is paid. This method of payment is exceedingly inferior to that which is obtained through a § 1983 suit.[27]

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[20] Webster & Lane, *supra* note 1.
[21] *See also id.*
[22] Zoom Interview with Emily Washington, Deputy Director, McArthur Justice Center, New Orleans (Feb. 24, 2023).
[23] *Id*.
[24] *Id*.
[25] Telephone Interview with William Most, Name Partner, Most & Associates (Feb. 23, 2023) (Mr. Most has handled many of the over-detention lawsuits in New Orleans).
[26] *Id*.
[27] *Id*.

This Note addresses the problem of the *Heck* bar and over-detention cases in five parts. Part I of this Note defines and explains the four key players that are working with and against each other trying to navigate *Heck* doctrine: over-detention, good-time credits, § 1983, and habeas. Part II reviews the current doctrinal landscape of § 1983 and habeas law collisions and how the *Heck* bar comes into play. And Part III situates *Heck* doctrine in the current literature and explains why over-detention cases pose a specific problem when it comes to *Heck* doctrine.

Part IV provides a qualitative survey of over-detention cases in the federal courts and whether or not over-detention cases are barred by *Heck*. The different circuit courts have analyzed this issue at different levels but have taken vastly different approaches. While I analyze and separate out cases by circuit, this is not to imply that all of the cases are Court of Appeals cases but rather that both federal district and appeals courts were looked at and then separated by circuit to more clearly elucidate differing philosophies. This is still an issue being actively litigated, with new and creative arguments around *Heck* constantly being put forth. I add the analyses of good-time credit cases to the conversation about over-detention cases because often times the two issues go hand in hand. There are many instances where the over-detention claim arises from a miscalculation of good time credit. Finally, Part V is a normative section which argues that *Heck* should not bar any 'classic' over-detention cases, proposes a method of analysis for analyzing some of the trickier sentence calculation cases, and finally, pushes back against some of the 'threshold' mechanisms some of the courts seem to be developing to answer these questions.[28]

[28] U.S. DEP'T OF JUST., INVESTIGATION OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS (2023) [hereinafter DOJ INVESTIGATION OF LDPSC], https://www.justice.gov/d9/pressreleases/attachments/2023/01/25/2023.1.25_ldoc_findings_letter_final_508_0_0.pdf.

I. Defining Key Players

The focus of this Note is on *Heck* doctrine and the ways in which *Heck* doctrine is being interpreted in different ways by the courts when it comes to over-detention and good-time credit cases. Before delving into the complexities of why this is and what the various outcomes are, this section aims to give basic definitions and summarize the key concepts at play. In addition to defining over-detention and good-time credits this section gives a basic introduction to § 1983 and habeas doctrine. These are the four foundational concepts operating within the *Heck* doctrine that will be built upon and analyzed throughout this Note.

A. Over-Detention

Over-detention is when a prisoner remains incarcerated past their legal confinement.[29] In other words, someone has been over detained when the amount of time in their legal sentence has passed, yet they remain incarcerated. Over-detention is newer and more specific than traditional false imprisonment. Black's Law Dictionary defines false imprisonment as "the restraint of a person in a bounded area without legal authority, justification, or consent."[30] To be clear, over-detention is a form of false imprisonment. But it more accurately describes what's actually occurring, because of false imprisonment's loaded historical association with false arrest, of which over-detention has nothing to do with. Indeed, "[s]ome courts have described false arrest and false imprisonment as causes of action which are distinguishable only in terminology. The two have been called "virtually indistinguishable, and identical."[31]

[29] *See, e.g.*, Jillian Kramer, *Former Inmate Can't Hold State Corrections Official Liable for 'overdetention,' Appeals Court Says*, THE TIMES-PICAYUNE, (Feb. 10, 2022), https://www.nola.com/news/courts/article_8dc41acc-8a9e-11ec-a7a5-e79d23da9eea.html.
[30] *False* Imprisonment, BLACK'S LAW DICTIONARY (11th ed. 2019).
[31] 32 Am. Jur. 2d *False Imprisonment* § 3 (1995).

They're not, however, because while a person who is falsely arrested is necessarily falsely imprisoned, a person falsely imprisoned may not have been falsely arrested at all.[32] This is exactly what the term over-detention describes. Nothing is assumed about one's arrest or conviction, instead the term suggests that there is a proper amount of detention and this is the term to use when one has been held over that proper amount of time.

Over-detention can happen for a multitude of reasons, from bureaucratic and administrative laziness to intentionally preventing one from leaving incarceration. The later, however, is much more common.[33] Or at least, much more commonly litigated and reported on. For example, in January of 2023 the United States Department of Justice (DOJ) released an investigative report on the Louisiana Department of Public Safety and Corrections.[34] The DOJ found that the Louisiana Department of Corrections "incarcerates thousands of individuals each year beyond their legal release dates in violation of the Fourteenth Amendment of the United States Constitution."[35] These are cases of over-detention due, in large part, to administrative laziness. The DOJ found that this systemic over-detention was due to serious deficiencies in the Department of Correction's policies and practices.[36] Perhaps one of the most frustrating aspects

[32] *Id.*
[33] *See e.g.* Lea Skene, *Detainees 'Unconstitutionally' Held at Baltimore Central Booking Long After court Grants Release, Lawsuit Claims*, BALT. SUN, Mar. 16, 2022, https://www.baltimoresun.com/news/crime/bs-md-ci-cr-lawsuit-claims-overdetention-20220316-4sr7qvlgmvdfbk33ttwffs666y-story.html.
[33] *See* Matt Reynolds, *California Can't Even Count, Ex-Inmate Says*, CAL. COURTHOUSE NEWS SERVICE, Feb. 21, 2013, https://www.courthousenews.com/california-cant-even-count-ex-inmate-says/; ACLU of Hawaii, *Overdetention Case Will Go To Trial*, ACLU, Jan. 15, 2010, https://www.aclu.org/press-releases/prison-overdetention-case-will-go-trial; David Reutter, *$731,000 Jury Award to Illinois DOC Prisoner Held 23 Months Beyond Release Date, Over $210k in Fees Awarded As Well*, PRISON LEGAL NEWS, Nov. 2021, https://www.prisonlegalnews.org/news/2021/nov/1/731000-jury-award-illinois-doc-prisoner-held-23-months-beyond-release-date-over-210k-fees-awarded-well/
[34] U.S. DEP'T OF JUST., INVESTIGATION OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS (2023) [hereinafter DOJ INVESTIGATION OF LDPSC], https://www.justice.gov/d9/pressreleases/attachments/2023/01/25/2023.1.25_ldoc_findings_letter_final_508_0_0.pdf.
[35] *Id.* at 1.
[36] *Id.*